FILE COPY

Office - Supreme Court, U. S.
JAN 15 1945
CHARLES ELMORE CROPLEY
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944.

No. 575

COLORADO-WYOMING GAS COMPANY, a corporation,
PETITIONER,

vs.

FEDERAL POWER COMMISSION; COLORADO INTERSTATE GAS COMPANY, a corporation; CITY & COUNTY OF DENVER, COLORADO; PUBLIC SERVICE COMMISSION OF WYOMING; PUBLIC SERVICE COMPANY OF COLORADO, a corporation; and CANADIAN RIVER GAS COMPANY, a corporation, RESPONDENTS.

BRIEF AND ARGUMENT OF PETITIONER.

DONALD C. McCREERY,
PAUL W. LEE,
GEORGE H. SHAW,
WM. A. BRYANS, III,
CHARLES J. KELLY,
1217 First National Bank Bldg.,
Denver, Colorado,
Attorneys for Colorado-Wyoming Gas Company, Petitioner.

JANUARY, 1945.

EASTWOOD PRINTING CO., 2031 CURTIS STREET, DENVER

INDEX.

	PAGES
BRIEF AND ARGUMENT OF PETITIONER	1-45
Opinions Below	2
Jurisdiction	2
Statute Involved	2
Questions Presented	2-4
The Opinion and Order of the Commission as It Relates to "Allocation of Costs"	4-8
The Opinion of the Court of Appeals	8-12
Issues of Law and Fact Involved	12
Specification of Errors	13
Statement of the Evidence	13-28
(1) Development and Operations of Colorado-Wyoming Company	13-18
(2) The Commission "Facts" and "Method" of "Allocation of Costs"	18-28
Brief of the Argument	29-45
(1) The Allocation Required by Law	30-34
(2) The Commission "Allocation of Costs" is not predicated on "facts" and is not based upon the Jurisdiction of the Commission under the Act	34-45
Conclusion	45

PAGES

APPENDIX A. Pertinent Provisions of Natural Gas Act 1a- 4a

APPENDIX B. Map of System of Colorado-Wyoming Gas Company 5a

APPENDIX C. The Scope and Duty of Judicial Review Resting on the Court of Appeals under the Natural Gas Act and Other Controlling Law of the Land 7a-26a

APPENDIX D. Colorado-Wyoming Gas Company Peak-Day Purchases and Deliveries of Natural Gas—1938, 1939, 1940 ..... 27a-29a

CASES CITED.

	PAGES
Addison v. Holly Hill Fruit Products, Inc. (1944) 64 Sup. Ct. 1215	26
Beaumont Sour Lake v. United States, 282 U.S. 74, 51 Sup. Ct. 1	43
Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 57 Sup. St. 868	34
Colorado Interstate Gas Co., et al. v. Federal Power Commission, 142 F. (2d) 943	9, 16, 26
Colorado-Wyoming Gas Co. v. Federal Power Commission, et al., 142 F. (2d) 943	2
Columbus Gas & Fuel Co. v. Pub. Utilities Comm., 292 U.S. 398, 54 Sup. Ct. 763	8, 32, 33
Crowell v. Benson, 285 U.S. 22, 52 Sup. Ct. 285	26
Dayton Power & Light Co. v. Pub. Utilities Comm., 292 U.S. 290, 54 Sup. Ct. 647	18
Detroit v. Panhandle Eastern Pipe Line Co. (F.P.C.), 45 P.U.R. (n.s.) 203	38-39
Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 575, 64 Sup. Ct. 281	26, 34
Federal Power Commission v. Natural Gas Pipeline Co., 315 U.S. 575, 62 Sup. Ct. 736	11, 26, 43
Federal Radio Commission v. Nelson Bros. Co., 289 U.S. 266, 53 Sup. Ct. 627	25, 26
Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U.S. 498, 62 Sup. Ct. 381	37
Interstate Commerce Commission v. Columbus & Greenville Ry. Co., 319 U.S. 551, 63 Sup. Ct. 1209	43
Milk Wagon Drivers' Union v. Lake Valley F. Products, 311 U.S. 91, 61 Sup. Ct. 122	34
Morgan v. United States, 298 U.S. 468, 56 Sup. Ct. 906	43

	PAGES
Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 143 F. (2d) 488, 54 P.U.R. (n.s.) 26	39
Re Colorado-Wyoming Gas Co. (F.P.C.), 43 P.U.R. (n.s.) 205	2
Securities and Exchange Commission v. Chenery Corp., 317 U.S. 80, 63 Sup. Ct. 454	29, 43
Simpson v. Shepard, 230 U.S. 352, 33 Sup. Ct. 729	30-31, 33
Smith v. Illinois Bell Telephone Co., 282 U.S. 133, 51 Sup. Ct. 65	8, 24, 30, 31, 33, 41
United States v. A. T. & S. F. R. Co., 234 U.S. 476, 34 Sup. Ct. 986	45
United States v. Carolina Freight Carriers Corp., 315 U.S. 475, 62 Sup. Ct. 727	43
United States v. South Eastern Underwriters Ass'n. (July, 1944), 64 Sup. Ct. 1162	34
Wabash Valley Elec. Co. v. Young, 287 U.S. 488, 53 Sup. Ct. 234	32
Wichita R. & L. Co. v. Pub. Utilities Comm., 260 U.S. 48, 43 Sup. Ct. 51	43

OTHER CITATIONS.

	PAGES
Constitution, United States, Fifth Amendment	13
Federal Power Act	32
House Representatives, Committee Interstate Commerce Hearings Re Federal Power Act and Natural Gas Act	32
Judicial Code	2
Natural Gas Act	2, 9, 10, 12, 20, 24-25, 32, 37, 38
Supreme Court Rules	10

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944.

No. 575.

COLORADO-WYOMING GAS COMPANY, a corporation, PETITIONER,

vs.

FEDERAL POWER COMMISSION; COLORADO INTERSTATE GAS COMPANY, a corporation; CITY & COUNTY OF DENVER, COLORADO; PUBLIC SERVICE COMMISSION OF WYOMING; PUBLIC SERVICE COMPANY OF COLORADO, a corporation; and CANADIAN RIVER GAS COMPANY, a corporation, RESPONDENTS.

BRIEF AND ARGUMENT OF PETITIONER.

Colorado-Wyoming Gas Company, petitioner herein (referred to as "Colorado-Wyoming Company" or "petitioner"), on October 10, 1944, filed herein its petition praying that this Court issue its writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Tenth Circuit (referred to as "Court of Appeals") *(R. V. 2, p. 1120)*, affirming a final order of the Federal Power Commission (referred to as "Commission") under the "Natural Gas Act" of 1938, which order found that "the rates and charges made, demanded and received by Wyoming Company for and in connection with the transmission and sale of natural gas for resale in interstate commerce * * * are unjust, unreasonable and excessive to

the extent of $119,000 per year,'' and directed reduction thereof accordingly *(R. V. 1, pp. 94-96)*.

Thereafter, this Court, on November 13, 1944, granted certiorari as follows:

> ''The petition for writ of certiorari is granted limited to the seventh question presented by the petition for the writ.''

OPINIONS BELOW.

The opinion of the Court of Appeals *(R. V. 2, pp. 1092-1120)*, in case entitled *Colorado-Wyoming Gas Co. v. Federal Power Commission, et al.*, is reported in 142 F. (2d) 943. The opinion and order of the Commission *(R. V. 1, pp. 45-85, 94-97)* is reported in 43 P.U.R. (n.s.) 205.

JURISDICTION.

The judgment of the Court of Appeals was entered July 8, 1944 *(R. V. 2, p. 1120)*; Petition for rehearing herein, filed on July 26, 1944 *(R. V. 2, p. 1123)*, was overruled August 9, 1944 *(R. V. 2, p. 1161)*. The jurisdiction of this Court is invoked under *Section 347(a) (Section 240, amended)* of the Judicial Code *(U.S.C.A., Title 28, Sec. 347(a))*, and *Section 19(b)* of the Natural Gas Act *(52 Stat. 821; 4 U.S.C.A., Title 15, Sec. 717r(b))*.

STATUTE INVOLVED.

The statute involved is the Natural Gas Act *(52 Stat. 821; U.S.C.A., Title 4, Sec. 717)*, the pertinent provisions of which are set forth in *Appendix A*, this brief.

QUESTIONS PRESENTED.

The ''seventh question'' specified by this Court as the scope of this review is as follows:

> ''7. The opinion and order of the Commission approved by the Court of Appeals, under the subject title of 'Allocation of Cost of Service,' is predicated upon the following assumptions and conclusions, to-wit:
>
> (1) It is assumed that the property of this petitioner and the properties of Colorado Interstate Gas Company and Canadian River Gas Company, admit-

tedly separate and independent for all other purposes in all respects, including rate making, nevertheless properly may be 'integrated' as a single system for purposes of allocation required in this case *(R. V. 1, p. 79)*.

(2) The Commission 'Allocation of Costs,' approved by the Court of Appeals, is not based in whole or in part upon the peak-day deliveries or other operations of this petitioner, but is predicated upon the peak-day deliveries and operations of Colorado Interstate Gas Company *(R. V. 3, Ex. 226, Table 2, Line 28, Cols. 7, 8, 9; R. V. 1, pp. 186, 358; R. V. 2, pp. 728-732, 561-562)*.

(3) The inaccuracy manifest in the record as to the asserted factual basis adopted by the Commission for its conclusions of 'allocation of cost of service' is ignored by both the Commission and the Court of Appeals. Such alleged basic facts are grossly inaccurate, and admittedly merely averages, estimates and guesses *(R. V. 2, pp. 728-732, 735-744, 746-748, 751-754, 756-758, 762, 764-765)*.

(4) The Commission 'Allocation of Cost of Service,' approved by the Court of Appeals, *admittedly does not involve and is not predicated upon any allocation of property whatever* as between property and operations subject to the rate-regulatory authority of the Commission in this case and property and operations not subject to that authority in this case, nor does it give consideration to the *actual* operating conditions of petitioner's system including priority of domestic service over industrial service of gas *(R. V. 1, p. 80; R. V. 2, pp. 561-562, 730-731, 786-789)*.

(5) It is assumed by the Commission 'All that can be accomplished by an allocation of physical properties can be attained by allocating costs including the return'. *(R. V. 1, p. 80)* and adopted by the Court of Appeals in the following language: 'The Commission further stated that it did not follow from that obligation (i.e., "allocation of the property used in regulated business from that used in unregulated business") that an allocation of physical property or portions thereof

must be made before any excessive returns were determined. * * * The separation or allocation may be effected by application of any formula which makes the principle a working one suitably adapted to the particular circumstances' *(R. V. 2, pp. 1112-1113)*.

The question presented then is: Whether the allocation of cost of service, so-called, adopted in this case is without support in the record and contrary to law."
(Petition for Certiorari, pp. 4-5.)

THE OPINION AND ORDER OF THE COMMISSION AS IT RELATES TO "ALLOCATION OF COSTS."

The Commission in the three separate proceedings against Canadian River Gas Company (No. 380, this Court), Colorado Interstate Gas Company (No. 379, this Court), and Colorado-Wyoming Gas Company, which were consolidated "for purposes of hearing thereon" *(R. V. 1, pp. 41-44)* conducted as "to each of the Companies as separate operating entities * * * three separate and distinct rate cases" *(R. V. 1, p. 79)*. Thereafter, and for purposes of "allocation," the Commission concluded that all the "separate" and independent properties and operations of Canadian Company, Colorado Interstate Company and Colorado-Wyoming Company are one "entire project," declaring in that behalf: "* * * although involving facilities of three corporate entities is, for all practical purposes, a single project now designed to produce, gather, transmit and sell natural gas from the Texas-Panhandle field to consumers along the line as far north as Cheyenne, Wyoming" *(R. V. 1, p. 79)*. In effect, according to the Commission, Colorado-Wyoming Company is engaged in the production of natural gas in Texas, and Canadian Company is engaged in the sale of natural gas in Wyoming.

There is no evidence in the record and there are no findings of fact or conclusions of law permitting this bold and arbitrary merger of these wholly "separate," "distinct" and entirely independent enterprises. By way of attempted justification, the argumentative assertion is indulged and relied upon that "The operation of the project is such that it is impossible, for example, to alter the rates of Canadian

Company without simultaneously affecting the reasonableness of the rates of Colorado Company. Likewise, the rates of Colorado Company cannot be altered without affecting the rates of the Wyoming Company" *(R. V. 1, p. 79)*. This contention simply obliterates all jurisdictional and legal barriers whenever the Commission finds it "necessary" or "convenient" so to do.

The Commission opinion proceeds:

> "The Commission is aware that in an investigation such as this it is incumbent on it to determine the reasonableness or unreasonableness of the rates and charges subject to its jurisdiction. This requires that the total costs of operations, including depreciation, taxes and a fair return, be distributed among the various customers served, individually or by appropriate groups. To the extent that such costs allocated to sales under the Commissioner's jurisdiction are less than revenues received, the rates and charges made are unjust and unreasonable, and revenues must be reduced accordingly.
>
> "It does not follow, from this obligation of the Commission, that an allocation of physical property or portions thereon, must be made, before any excessive returns are determined, as seems to be the contention of the companies. • • •
>
> "All that can be accomplished by an allocation of physical properties can be attained by allocating costs including the return. The latter method is by far the most practical and business-like."
>
> *(R. V. 1, pp. 79-80.)*

Thus, without consideration or discussion of the *then* established, settled and controlling law declaring the principles and requisite manner and method of allocation, and determination of the value of the property employed in the jurisdictional or regulated sale for resale business and as to the revenues and expenses incident to that business, the Commission simply discards the principle of "allocation of physical properties" in its entirety.

Having disposed of all legal restraint upon it, the Commission next enumerates the variable and adjustable so-

called "principles" of its alleged "cost allocation." These, it is said, were applied to "Canadian and Colorado Companies" and that "modification" applied to Colorado-Wyoming Company.

"Commission staff exhibits on cost allocation followed principles that have long been recognized as reasonable in the public utility field and are widely accepted. Therein costs are divided essentially into two groups, fixed and variable. Fixed costs are largely joint costs which do not vary with volume of sales. The total amount of such costs are largely proportional to the maximum demand on the system or system capacity. Accordingly, these costs have been allocated basically in proportion to each customer's responsibility for the peak day demand. Variable costs are largely those that vary proportional to output or volume of sale. Accordingly, these costs have been allocated in proportion to volume of gas purchased by each customer.

"The principles and methods of cost allocation presented by Commission staff are obviously the most appropriate and reasonable for Canadian and Colorado Companies.

• • • • •

"In preparing its allocation of costs for Wyoming Company, Commission staff departed from the use of the system peak day for allocating demand (fixed) costs and combined the separate class peaks of resale customers and of main line industrial customers. This method is commonly used, but under the particular circumstances surrounding the deliveries of gas to the industrial customers involved, a variation from that method as hereinafter set forth would be in keeping with the Company's operations. The Colorado Portland Cement Company, the principal main line industrial user, is curtailed regularly during system peak days. Its demand on the system peak day is, in our opinion, a proper measure of its proportionate share of demand costs than its highest off-peak demand. Accordingly, the principles and methods of cost allocation presented by Commission staff are adopted with the modification that the coincident de-

hands of all customers on the system peak day are used, and with exception of deliveries to Highway Gas Company."

(R. V. 1, pp. 80-81, 82-83.)

The structure of the Commission "cost allocation," it is declared, is based "largely" and "basically," and in general upon the division of "costs" between "fixed" and "variable" costs. This, of course, means that the division and classification of "costs" as between "fixed" and "variable" is open ended and at large, that is, purely an uncontrolled choice, "discretion" or "judgment" of the Commission.

The *Commission* evidence *(Comm. Ex. 227, Table 2, R. V. 3)*, considered *infra*, discloses affirmatively that *in fact* neither the Commission staff nor the Commission itself followed or applied the so-called "principles and methods" and "the modification" thereof as quoted from the foregoing recitals of the Commission order.

As we also point out, *infra*, the Commission "allocation of costs" procedure, as applied to this Company, is neither methodical nor formulary. It is a mere device or arrangement of alleged "costs," wholly devoid of any controlling principle. "Facts" are assumed without evidentiary support and in numerous instances contrary to the record evidence.

It is to be observed that the Commission treatment of "allocation of costs" is entirely barren of findings of fact. There are no disclosures as to the methods and results of the application of the Commission "method" which it is asserted, without support, "is commonly used." No statement or finding is made as to what "the particular circumstances" were, or why they rendered it necessary to develop the "variation" or "modification" of the "commonly used" principle or method, which the Commission "adopted" and applied to this Company. The Commission freely indulged conclusions but did not undertake any explanation whatever of its procedure or the application made thereof *(R. V. 1, pp. 83-83)*. It cannot be determined on this record "other than by sheer acceptance of the Commission conclusion, in the form of its statement of the result and the cryptic formula-

tion" thereof, what, if any, are its basic factual and legal foundations.

THE OPINION OF THE COURT OF APPEALS.

Upon the issue of "allocation," the Court of Appeals simply adopted the devices and conclusions of the Commission, without any examination or consideration of the principles of law controlling or of the requisite foundation facts.

(1) The Court of Appeals apparently overlooked or misconceived the distinction in fact and law between "allocation of property" and "allocation of costs" also described as "allocation of cost of service," for the opinion states: "The separation may be appropriately effected by estimating or appraising the value of *the property used in the regulated business and that used in the unregulated business. Smith v. Illinois Bell Telephone Company*, 282 U.S. 133" (Emphasis added.) Then it is said by the Court, "The separation or allocation may be effected by application of *any formula* which makes *the principle* a working one suitably adapted to the particular circumstances," citing *Columbus Gas & Fuel Co. v. Public Utilities Commission*, 292 U.S. 398. (Emphasis added.) If by "any formula" the Court means the Commission lawfully may promulgate, and the Court is at liberty to approve, a formula which discards, "allocation of property" and substitutes therefor "allocation of cost of service," then that Court is not supported by the *Columbus Gas & Fuel Co.* case cited by it, or by the other controlling decisions, none of which have been overruled. These are considered *infra*.

(2) As to the application of the Commission "method" in the light of the record evidence in this case, that Court declared:

> "But, assuming that the requisite separation may be accomplished by an allocation of cost of service, the method used by the Commission is said to be erroneous. It is *argued* among other things that it *assumes* that all of the property is used in common in the conduct of all business *whereas a large portion is used exclusively in the regulated portion, another part is used exclusively in the unregulated portion, and only a part is used in common*

in both businesses; that in respect to the property which is used in common for both businesses, it fails to give consideration to the priority or preferential use of such property in supplying gas for domestic consumption as against unregulated business, and ignores actual peak demands and load factors; *that it operates to minimize all costs, produces apparent cost much less than actual cost, and shifts cost from regulated to unregulated business; and that it is unsound in fact and law.* It may be conceded, without deciding, that the *method* is not *free from defects* or imperfections in *all* its aspects." (Emphasis added.)

Having disposed of "the principle" of law requiring "allocation" of "the property" as between "the regulated business" and "the unregulated business," by approval of the purported "formula" adopted by the Commission as "appropriate and reasonable," and having conceded in effect that the Commission procedure "is unsound in fact," the Court of Appeals, nevertheless, foreclosed the whole matter of "allocation" as follows:

"But even so it cannot be said that as a consequence, the impact of the orders of reduction, each in its totality, produces arbitrary results or oversteps the bounds of due process. Therefore the orders are not open to further judicial inquiry on these grounds. *Federal Power Commission v. Natural Gas Pipeline Co., supra; Federal Power Commission v. Hope Natural Gas Co., supra.*" (Emphasis added.)

(R. V. 2, p. 1114.)

Colorado Interstate Gas Co., et al. v. Federal Power Commission, 142 F. (2d) 943, 958-959.

Such a record of summary judicial action poses at once the question: What is the measure and duty of review actually delegated to and imposed as a matter of law upon the Court of Appeals by *Section 19(b)* of the Natural Gas Act?

Obviously, the scope of the authority and *duty* of judicial review under the Natural Gas Act is governed and controlled by the terms and provisions of that Act. The determination of that scope admittedly is a legislative function, and Con-

gress, in which body "all legislative powers" of the federal government "are vested," *has acted.* Neither the Commission nor the courts have any authority to question or overrule that legislative policy and action, nor are the Commission and the courts concerned, within the authorized spheres of their respective powers, as to whether Congress was required to accord the right of review which it in fact granted. The only inquiry is: What was that Congressional action?

Section 19 (b) of the Act grants two separate and distinct rights of judicial review, to-wit: (1) the statutory "review of such order in the Circuit Court of Appeals" as specifically detailed in *Section 19 (b)* (except the last sentence thereof); and (2) the limited review by certiorari of "the judgment and decree of the court" in the Supreme Court of the United States (last sentence of *Section 19 (b)*).

The review in the Court of Appeals *is a matter of right* and is the primary and more extensive review; while the review by certiorari in the Supreme Court *is not a matter of right*, but is the established, restricted and very limited review accorded by this Court under that writ.

The scope and duty of review in that Court, the Congress defined and fixed with particularity in the Act itself.

The scope and duty of review by this Court on certiorari of "the proceedings in the court to which the writ is asked to be directed," Congress left as it found it, that is, as theretofore fully settled and declared by this Court in its rules and decisions, as follows: "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor" *(Rule 38 (5)).*

Analysis of *Section 19 (b)* of the Act *(Appendix A,* this brief) demonstrates that the scope and duty of review by that Court *of the Commission order* and by this Court *of the decision of that Court* are not identical, but are widely different and variant, as Congress declared in unambiguous language.

The measure of review directed to that Court and to this Court being different, the reviewing action of each court must be in conformity with the Congressional mandate di-

rected to it. As to the scope and duty of review imposed on the Court of Appeals by the Act and the settled law at the time of the passage of that Act, see *Appendix D*, this brief.

It is entirely clear that the specific function and duty directly imposed by the Act upon the Court of Appeals, as the court of primary review, is to determine whether the findings, conclusions and order of the Commission conform to the controlling legal and statutory requirement. Recently this Court has enumerated those requirements as: action within the ambit of the statutory authority of the Commission; "a fair hearing," which has a settled and well understood meaning under our system of government; "proper findings," that is, in conformity with and predicated upon the record evidence; adherence to "other statutory requirements;" and application of the principles of "due process," which relate to matters of substance as well as to mere form. Thereafter, and only if and when the foregoing fundamental and basic conditions precedent have been satisfied, does the Court of Appeals reach the realm of "end result," "entirety" or "totality" as an overall measure of the reasonableness, propriety and legality of the Commission action. But even so "viewed," the order must be measured "as applied to the facts before it" (the Commission), that is, upon the entire record and "in its entirety," which comprehends in this case 13 *specific* findings and conclusions and the opinion of the Commission expressly incorporated therein *(R. V. 1, pp. 94-97)*.

Federal Power Comm. v. Natural Gas Pipeline Co., 315 U.S. 575, 586, 62 Sup. Ct. 736, 743.

The Court of Appeals, as is apparent from the foregoing quotations from its opinion, did not so "view" or measure the requisite legal and factual foundations of the Commission action.

It misconceived the controlling law applicable both to the Commission action and to the judicial review thereof, as declared in the Act and the decisions of this Court. As a result, that Court inevitably disregarded the law and ignored the facts. Upon the issue of "allocation," the Court of Appeals performed no function of actual judicial review what-

ever, merely the formal process of validating retroactively the Commission procedure.

ISSUES OF LAW AND FACT INVOLVED.

Presented in the "seventh question" and, therefore, under consideration in this review, are the following issues of law and fact relating to the question of "allocation":

(1) It is necessary, as a matter of law, that there be a separation and "allocation" of that portion of the property and facilities devoted to and the business transacted by the Company in connection with "the sale in *interstate commerce* of natural gas *for resale* * * *," from that portion of the property, facilities and business devoted to and transacted in connection with the operations to which "the provisions of this Act * * * shall not apply * * *" (Sec. 1(a)). This the Commission refused to do.

(2) The requisite "allocation" cannot be made by the device of an "allocation of costs," so-called. There must be an actual separation and apportionment of that portion of the properties and facilities, and a determination of the value thereof, employed in the business to which "the provisions of this Act shall apply," from that portion thereof to which "the provisions of this Act * * * shall not apply." That is, the requisite "allocation" must be made: (1) between "sales for resale" and all "direct sales;" and (2) between *intrastate* "sales for resale" and *interstate* "sales for resale," over the latter of which only does the Commission possess rate-regulatory authority under the Act. This the Commission refused to do.

(3) The requisite "allocation" must be made "independently of revenue" and "return." This the Commission refused to do.

(4) The requisite "allocation" must be made in conformity with established principles and settled and disclosed methods of procedure. This the Commission refused to do.

(5) The requisite "allocation" must be predicated upon the *actual* structure and operations of the Company to which it is to be applied. This the Commission refused to do.

SPECIFICATION OF ERRORS.

In view of the foregoing, the fundamental and fatal errors of the Commission and of the Court of Appeals, in approving the Commission action, are:

(1) The Commission "allocation of cost," so-called, is without authority of and contrary to law, and the Court of Appeals, in permitting such procedure to prevail, failed to perform the judicial function and duty imposed upon it by the Fifth Amendment of the Constitution of the United States and the Natural Gas Act.

(2) The Commission "allocation of cost," so-called, is not supported by "substantial evidence" and is contrary to the record evidence herein, and the Court of Appeals, in refusing to consider, view and test such action by "the facts before the Commission" failed to perform the judicial function and duty imposed upon it by the Fifth Amendment of the Constitution of the United States and the Natural Gas Act.

STATEMENT OF THE EVIDENCE.

1. Development and Operations of Colorado-Wyoming Company.

Colorado-Wyoming Company is a small company. It presently owns and operates a natural gas transmission system from a point near Littleton, Colorado, to Cheyenne, Wyoming, with several branches. The main trunk line is approximately 114 miles long, *of which 10.5 miles are in Wyoming.* Branch lines are approximately 81 miles in length, *of which 2.3 miles serving the United States government at Fort Warren, Wyoming are in Wyoming.* (See *Map, R. V. 3, Ex. 50, Appendix B, this brief.)* In 1939, the test year adopted by the Commission, the total gross sales of the Company were 3,332,446 M.c.f., producing $828,938 *(R. V. 3, Ex. 115, St. No. 1).* The total "sales for resale" of the Company were 1,706,000 M.c.f., producing a gross revenue of $579,000, of which "sales for resale" at the Cheyenne, Wyoming, "city gate" were 494,000 M.c.f., producing $182,000. Such Wyoming "sales for resale" were less than *one-third* of the total "sales for resale," both in quantities of gas sold and in gross revenue derived therefrom *(R. V. 1, pp. 126-128; R. V. 3, Ex. 245, St. No. 8).*

All cities, towns and communities supplied with natural gas by petitioner are served through contracts with sundry distribution companies "for resale for ultimate public consumption" *(R. V. 1, pp. 190-193)*. The only city or community served by petitioner outside the State of Colorado is the City of Cheyenne, Wyoming *(R. V. 1, p. 121)*. Industrial users and public authorities are served directly by petitioner under contracts of "direct sale" to such customers as the ultimate consumers *(R. V. 1, pp. 193-200)*. The only industrial user or public authority served outside of the State of Colorado is the United States government at Fort Warren, Wyoming *(R. V. 1, p. 121)*.

Colorado "direct sales" aggregated 1,622,231 M.c.f., producing $241,948, and Wyoming "direct sales" aggregated 18,527 M.c.f. in 1939, producing $7,410 *(R. V. 1, p. 127, R. V. 3, Ex. 202, p. 32)*.

Petitioner company began operations in 1925. During the years 1925 to 1927 that part of the Company's system from and including Fort Collins, Colorado, north to and including Cheyenne, Wyoming, was constructed. At that time petitioner secured its entire gas supply from the Wellington Field of the Continental Oil Company, near Fort Collins, Colorado. That gas supply had been expected and was relied upon to meet all requirements of the Company with respect to its then completed system for a long term of years. However, it became apparent early in the year 1929 that the supply of gas from the Wellington Field, then rapidly diminishing, shortly thereafter would be entirely exhausted. As a consequence, it became essential at once for the Company to secure a new and independent source of supply to continue service to its then customers and to protect its own investment. The only supply available was Texas gas from the Texas Panhandle-Denver pipeline of Colorado Interstate Gas Company. Accordingly, a twenty-year contract for the purchase of such Texas gas from the company last named was entered into in October, 1929, such gas to be purchased from Colorado Interstate Gas Company and delivered to Colorado-Wyoming Company at the Arapahoe metering station of this petitioner near Littleton, Colorado.

In the years 1929 and 1930, petitioner constructed 73 miles

of main 10-inch and 8-inch transmission line from the Arapahoe measuring station near Littleton, Colorado, to Fort Collins, Colorado, where connection was made with the then existing operating system of petitioner from Fort Collins, Colorado, to Cheyenne, Wyoming.

After construction of the Arapahoe-Fort Collins main line, and the commencement of purchase of gas at the "Arapahoe Station" near Littleton, Colorado, there was no enlargement or extension of facilities or service in or for Wyoming.

In the years 1929 to 1931, several branch transmission lines were constructed from the newly constructed Littleton-Fort Collins line for the sale and delivery of gas for resale for ultimate public consumption in about a dozen different cities and towns, all in the State of Colorado. In the years from 1932 to 1939, lateral lines also were constructed to serve sundry industrial customers under direct sales, all in the State of Colorado.

(R. V. 1, pp. 121-126).

The system is equipped with three compressor stations all in Colorado. The first installed in 1940 is adjacent to the Arapahoe Metering Station, the point of delivery of gas purchased from Colorado Interstate Gas Company. The second is near Arvada, and the third, near Wellington. The latter station re-pressures that gas, which thereafter is transported to and sold at Cheyenne, Wyoming *(See Map, Appendix B, this brief).*

There were thus in fact two separate and independent stages in the development of the Colorado-Wyoming Company system: (1) 1925-1929, the construction, completion and utilization of the Fort Collins-Cheyenne system served exclusively by the Wellington, Colorado, gas field of the Continental Oil Company; and (2) 1929-1941, the construction, completion and utilization of the Littleton-Cheyenne system and branches, now served (except about 2%) from the Texas-Panhandle field by the facilities of the Canadian River and Colorado Interstate companies. In this fundamental change in the Company's operations, the original and complete Fort Collins-Cheyenne system has become a part only of the now

operating Littleton-Cheyenne system. This historical development of the enterprise is significant and highly important in connection with the question of "allocation" now under consideration.

Colorado-Wyoming Company presently purchases almost all of its natural gas requirements in Colorado (near Littleton) from Colorado Interstate Gas Company. Such completed sale by the latter named company to petitioner is subject to the rate-regulatory authority of the Commission, and that authority was exercised by the Commission in the fixation of rates charged by Colorado Interstate Gas Company to Colorado-Wyoming Company at the Arapahoe metering station near Littleton, Colorado *(Colorado Interstate Gas Company v. Federal Power Commission, et al., 142 F. (2d) 943; R. V. 1, pp. 85, 90-94).*

The systems of the two companies are connected solely for the purposes of such sale, purchase and delivery. The two systems are entirely independent in management, control and operation. They are not "integrated" or in any sense a single system, or combined in any manner, or for any purpose. Upon this the record is clear. *(R. V. 1, pp. 120-121, 122-123; V. 3, Ex. 10, pp. 2-4).* This fact is admitted by the Commission in its opinion *(R. V. 1, p. 79)* and by the impressive fact that throughout the proceedings before the Commission and the rate determinations made by it, Colorado-Wyoming Company was of necessity considered and dealt with as wholly separate from and independent of Colorado Interstate Gas Company (save only that the Commission, unsupported by fact, resorted to the fiction of "integration" for purposes of its "allocation of cost," so-called). Colorado-Wyoming Company, *then an operating company,* was no part of or in any manner considered in or a part of the agreed plan of development *(R. V. 3, Ex. 1, p. 7)* of the Texas pipeline to Denver *(Op. of Ct. of App., 142 Fed. (2d) 943, 948-949).* but became merely a purchaser of such gas at a later date because of the unexpected exhaustion of its supply of gas from the Wellington Field in Colorado *(Op. of Ct. of App., 142 Fed. (2d) 943, 950) (Comm. Ex. 51, R. V. 3 pp. 1-6).*

It appears in the record, without dispute, that the system

of Colorado-Wyoming Company, as originally built and as later enlarged, was conceived, constructed and at all times operated on the foundation of the priority of domestic and commercial customers served under "sales for resale" contracts over "industrial" customers *(R. V. 1, pp. 128, 150-152)*.

"Priority" of domestic users and "curtailment" or "shut off" of industrial users, if necessary to supply the demands of domestic users, is a fundamental characteristic of the Colorado-Wyoming Gas Company system and of its operations. Such "priority," "curtailment" and "shut off" are provided and required in several ways:

By the contract between Colorado Interstate Gas Company and Colorado-Wyoming Gas Company *(R. V. 3, Ex. 101, pp. 4-5)*; by the respective "city gate" contracts covering "sales for resale" between Colorado-Wyoming Gas Company and Public Service Company of Colorado, Cheyenne Light, Fuel and Power Company and Greeley Gas and Fuel Company *(R. V. 1, pp. 190-192)*; by the respective contracts between Colorado Interstate Gas Company and Public Service Company of Colorado, Pueblo Gas and Fuel Company and Colorado-Wyoming Gas Company, in which the cities of Denver and Pueblo are given priority over Colorado-Wyoming Gas Company *(R. V. 3, Ex. 101, p. 4)*; and by the various franchises to the distribution companies granted in Arvada, Berthoud, Boulder, Fort Collins, Golden, Greeley, Johnstown, Loveland, and Longmont, *Colorado*, to supply natural gas purchased from Colorado-Wyoming Gas Company in the cities and towns named which provide for such preference "cut off" or "shut off" in substantially the same language as follows:

> The rates to be charged by the Company for natural gas service to industrial users for heating, manufacturing, power and other purposes, may be lower and different from those charged for domestic purposes, and the Company may contract with industrial users for the sale of such natural gas, provided that all such contracts contain a "cut off" clause which shall recognize the preferred rights of domestic users over industrial users, *(R. V. 1, pp. 150-152, 183-186)*.

Deliveries under *all* "direct sale" industrial contracts are subject to curtailment or "shut off" to satisfy the demands of domestic consumers *(R. V. 1, p. 195)*.

"Shut off" or "curtailment" of "direct sale" consumers occurred repeatedly in 1938, 1939 and 1940 *(R. V. 1, pp. 146-149, 152-157, 185-186)*.

2. The Commission "Facts" and "Method" of "Allocation of Costs."

The Commission, with full knowledge thereof, gave no consideration and no effect to the facts and factors of the operations of this Company in its so-called "Allocation of Costs for Wyoming Company" *(R. V. 3, Comm. Ex. 227)*, adopted by the Commission in its order *(R. V. 1, pp. 79-80, 82-83; R. V. 2, pp. 728-731, 786)* and approved by the Court of Appeals in its opinion herein *(R. V. 2, pp. 1112-1114)*.

The test, of course, is *not* "what was said" but "what was done" *(Dayton Power & Light Co. v. Public Utilities Comm., 292 U.S. 290, 296, 54 Sup. Ct. 647, 651)*.

(1) The Commission witness *Lyon* who prepared and presented the Commission "Allocation of Cost of Service," so-called, *(Comm. Ex. 227, R. V. 3)*, testified respecting that "Allocation of Costs" exhibit.

"Q. Mr. Lyon, did you give consideration or effect in your study to the fact that at the present time the entire capacity of the Colorado-Wyoming system is required to satisfy peak day demands of domestic consumers?

"A. No effect."

(R. V. 2, p. 786.)

(See also *R. V. 2, pp. 730-731.)*

(2) While the Commission opinion is entirely silent on the subject *(R. V. 1, pp. 79-83)*, the "peak day demand," which is declared to be inherent in the device of "allocation" adopted by the Commission for the single Texas-Wyoming project *assumed* to exist, is "the maximum day deliveries on Colorado Interstate Gas Co. Peak Day—Thurs., Feb. 9, 1939" *(Comm. Ex. 227, Table 2, R. V. 3)*. Such "deliveries" *by* Colorado Interstate Gas Company do not reflect either the maximum deliveries *to* or *by* Colorado-Wyoming

Company on February 9, 1939, or at any other time. *Such "deliveries" were not the "peak day demand" of Colorado-Wyoming Company at any time.* (See *Appendix D*, this brief).

(3) The deliveries *by* Colorado Interstate Gas Company *to* this Company on February 9, 1939, were 11,334 M.c.f., as used in the Canadian and Interstate Companies "allocation" *(Comm. Ex. 226, Table 2, Line 28, Col. 9, (R. V. 3))*, and 10,786 M.c.f., as used in the Colorado-Wyoming Company "allocation" *(Comm. Ex. 227, Table 2, Line 40, Col. 9 (R. V. 3))*. The deliveries of natural gas to *this* Company on February 9, 1939, by Highway Gas Company from the Berthoud, Colorado Field of 173 M.c.f. were ignored on the unfounded assumption that such deliveries were "for all practical purposes an exchange of gas" *(R. V. 1, p. 83)*. Thus, *the Commission evidence* as to the "peak day demand" of February 9, 1939, is in *substantial conflict* with itself.

(4) Next, the Commission so-called "peak day demand" of 10,786 M.c.f. was divided or "apportioned," *not* between *jurisdictional* "sales for resale" and *non-jurisdictional* "direct sales," in accordance with and as required by the Act. The division or apportionment *as made by the Commission and its staff* was between "Domestic, Commercial, Gas Lost" 7,014 M.c.f., and "Industrial" (both "direct sale" and "sales for resale") 3,772 M.c.f. *(Comm. Ex. 227, Table 2, Cols. 7, 8 and 9, Line 40 (R. V. 3))*. There is no basis in the Act for any such apportionment. Had the division or apportionment been made *even on the Commission evidence between the regulated and the non-regulated business as required by the Act*, it would have been "sales for resale" 9,009 M.c.f. and "direct sales" 1,777 M.c.f. *This is a vastly different ratio* (83.5% to 16.5%) than the ratio (65% to 35%) upon which the Commission acted, *as is apparent upon the face of the Commission exhibit, supra.* Yet as to the procedure of the Commission staff, the Commission in its opinion declares: "In preparing its allocation of costs for Wyoming Company, Commission staff departed from the use of system peak day for allocating demand (fixed) costs *and combined the separate class peaks of resale customers and of main line in-*

dustrial customers" (R. V. 1, p. 82). This the staff did not do. It "combined" *a portion only* of the assumed "separate class peaks of resale customers" and *a fictitious amount substantially in excess of* "the separate class peaks, * * * of main line industrial customers." The figures and percentages used by Commission staff were not divided *at all* between the regulated "resale customers" and the non-regulated "main line industrial customers," the Commission statement to the contrary notwithstanding *(Comm. Ex. 227, Table 2, Cols. 7, 8, 9 (R. V. 3))*. Thus, the Commission "allocation of costs," so-called, does not even purport on its face to be or produce an apportionment of "costs" as between the regulated and non-regulated operations *(Sec. 1(b) of the Act)*.

(5) The Commission declares: "The Colorado Portland Cement Company, the principal main line industrial user, is curtailed regularly during system peak days. *Its demand on the system peak day* is, in our opinion, a proper measure of its proportionate share of demand costs than its highest off-peak demand" *(R. V. 1, p. 82)*. There is no evidence whatever in the record of the "demand on the system peak day" of that Company. As pointed out, February 9, 1939, is assumed by the Commission to be that day (See *Comm. Exs. 226 and 227, Table 2* of each). The Cement Company was not "shut off" and in fact received no natural gas whatever on February 9, 1939, or during the entire month of February, 1939 *(Comm. Ex. 308, R. V. 3)*. Further, the Commission and its staff made no inquiry and offered no evidence as to whether or not the Cement Company was either shut off or curtailed on the actual "system peak day" of this Company in the years 1938, 1939 or 1940. What then was "its demand" on February 9, 1939, or on any system peak day? There is no disclosure. The record is silent. The Commission and its staff *in fact* did not know the demand of the Cement Company on February 9, 1939, unless it be concluded, *as was the fact*, that "its demand" at that time was zero. This suggests double talk in the Commission so-called "modification of method" adopted as to this Company *(R. V. 1, pp. 82-83)*. There was no demand in fact and there was not and could not be any

measure of demand at that time. There is no conflict in the evidence upon this matter.

(6) The Commission staff compilation of "separate class peaks of resale customers and main line industrial customers" *(Comm. Ex. 227, Table 2, Cols. 7, 8, 9, 10, 11)* adopted by the Commission *(R. V. 1, p. 82)*, admittedly are merely guesses, estimates and averages. It was conceded by the sole Commission witness on "allocation," on cross-examination, that most of the tabulated figures used by him in his exhibits were not even approximately accurate *(R. V. 2, pp. 735-739, 742, 743, 746-748, 748-754, 756-758, 760-762, 764-765, 771)*. The resulting division made by him between classes of customers *(Cols. 7 and 8)* necessarily is arbitrary, in view of the admitted *fact* that every figure in *Column 8* was a guess, an estimate or some sort of an assumed daily average of weekly or monthly deliveries. However, even on the theory of averages, *Commission Ex. 227, Table 2, Column 8 (R. V. 3)* cannot be reconciled with *Commission Exhibit 308 (R. V. 3)*. That the attempted set-up and apportionment *(Comm. Ex. 227, Table 2, Cols. 7, 8)* is not factual is also demonstrated by the discrepancy between that exhibit and *Commission Ex. 226, Table 2, Line 28*, and *Exhibit 308 (R. V. 3)*. The whole matter obviously is a speculation, not a fact finding.

(7) Even if it be assumed, *arguendo*, that a "cost of service allocation" be legal, the procedure indulged by the Commission and its staff does not follow any ordered or orderly principle, rule, formula or method. The Commission, in describing its "method," so-called, takes it completely out of the category of a principle, rule, formula or orderly procedure, by its statement that "largely" or "basically" it followed that "method" *(R. V. 1, p. 80)*. The "method" which the Commission declares "is by far the most practical and business-like" and by the use of which "all that can be accomplished by an allocation of physical property can be attained * * *" contemplates and involves a definite and specific plan, not a mere device. The procedure to produce the supposed allocation theoretically requires the apportionment of "costs" so-called (that is, under the Commission plan, expense and return),

as between the regulated and non-regulated operations, by a division of such "costs" into two principal ultimate categories, to-wit, "fixed" and "variable" costs, also variously described by the Commission as "capacity" and "volumetric" or "demand" and "commodity" costs. "Variable," "commodity" or "volumetric" costs "vary proportional to output or volume of sale," and so are "allocated in proportion to volume of gas purchased by each customer." The "fixed," "demand" or "capacity" costs are "proportional to the maximum demand on the system or system capacity." These are allocated in proportion "to each customer's responsibility for the peak day demand." *The two resulting ratios are widely different and, being different, it makes great difference in the final result, how the various costs are classified as between the two categories.* Under the Commission "method" and the "modification" thereof, it is of the very essence of the concept that the basis of classification and the application thereof be accurate, definite and certain to produce even an approximately correct "cost of service allocation." But that has not been the Commission procedure, and that is the very reason the Commission in its opinion undertook to protect itself by the qualification that only "largely" or "basically" did it follow the method described by it. This leaves the whole determination of the purported allocation under the Commission asserted "cost of service" in the air and at large. Thus, the Commission and its staff, in their uncontrolled discretion and without explanation, were enabled to and did classify, shift and apportion "costs" between the two categories, "fixed" and "variable" *(R. V. 1, pp. 80-82)*. That there is no governing principle, rule or method involved in the Commission procedure, is apparent from the record evidence.

The classification of "costs," as between "fixed" or "capacity" and "variable" or "volumetric," in the Commission "allocation cost of service," was purely "arbitrary and fortuitous," or, as stated by the Commission allocation witness, a matter of uncontrolled opinion or judgment *(R. V. 2, pp. 780-782)*. Such a classification of "costs," if of value, must result from the very nature of the particular costs involved, otherwise the nomenclature becomes an

empty formality. For example, wholly without regard to the source of earnings, as between the regulated and the unregulated industrial business, and even though "the industrials" are not paying their way, according to the evidence of that witness, the Commission witness and the Commission divided federal and state income taxes 50% to "fixed" and 50% to "variable" costs *(R. V. 2, pp. 780-782)*. Similarly, depreciation, return and other items were divided between such "fixed" and "variable" costs without any factual or other explanation or finding whatever *(Comm. Ex. 227, Table 6, R. V. 3)*.

The position of this petitioner is that "depreciation," just as plant itself, is a "fixed" or "demand" cost. Depreciation accrues, and was accrued by the Commission, from year to year without any relation whatever to the volume of gas transported and sold from year to year. Similarly, the plant itself stands in constant readiness to serve, which is the very essence of the concept of "fixed" or "demand" cost, which "cost," under the Commission theory includes return. Hence return *on that plant*, at the rate allowed by the Commission is equally a fixed "cost." Whether or not in a given case the utility can realize the full amount of that allowed return is quite beside the point, for there is, of course, no guarantee to the utility of realization upon that allowed rate of return. The issue here involved is simply whether or not such Commission action is to be without legal restraint or judicial control. And that issue is not resolved by calling such action the exercise of "judgment" and therefore not subject to review. The action complained of is not based upon any principle, rule or orderly and settled course of procedure, but results merely because the Commission so wills.

The "classification" of such "costs" being uncontrolled, it is fortuitous, and the result is both arbitrary and capricious. All *substance* of principle, formula or method is lacking. The procedure being a mere device, it cannot be tested either in fact or in law. It is administrative finality in conception and administrative supremacy in application.

The "peak day demand," if accurately ascertained and

utilized, which was not done in this case, is supposed to reflect the relative demand upon "system" or "system capacity" of the preferred domestic consumers and the inferior industrial customers. But this is not enough, for the Act measures and limits the Commission jurisdiction, not on a *use* basis but on a *sales* basis; that is to say, between "sales for resale" and "direct sales." *Nothing in the Commission "method," so-called, produces or is directed to, or contemplates any kind of "allocation" or "costs" between "sales for resale" and "direct sales."* The basis and apportionment under the Commission procedure is between "direct sale" and "sale for resale" industrial business, on the one hand, and all other sales operations on the other. The synthetic and also inaccurate apportionment of the alleged "peak day demand" *(Comm. Ex. 227, Table 2, R. V. 3)* was the ratio of 3,772 M.c.f. to 7,014 M.c.f. between *direct* and *resale* industrial sales and all other sales. The statutory apportionment on the same total figures (10,786 M.c.f.) is the ratio of 1,777 M.c.f. to 9,009 M.c.f. between "direct sales" and "sales for resale." The difference in the resulting ratios obviously is very great, and, even in an "allocation of cost of service" procedure, the statutory jurisdictional limitations must be conformed to. This was not done and no attempt was made to do it in this case.

(8) The extent *geographically* of the rate-regulatory jurisdiction of the Commission over this petitioner in this case necessarily must be determined before "allocation" in any form can be made. If the Commission, under the Act, does not have such jurisdiction over the *Colorado* "sales for resale" of this Company, obviously that portion of the property devoted to and the operations constituting such Colorado "sales for resale" must be *excluded* from the Commission action and order. Such is the very function of allocation. *(Smith v. Illinois Bell Telephone Co.*, 282 U. S. 133; 149, 51 Sup. Ct. 65, 69)

The full measure of and limitations upon the regulatory authority delegated to the Commission are declared by Congress in *Section 1* of the Act.

The Act provides:

"The provisions of this Act shall apply * * * to the

sale in interstate commerce of natural gas for resale * * * but shall not apply to any other * * * sale of natural gas * * *" (Sec. 1(b)).

"All rates and charges made * * * for or in connection with the * * * sale of natural gas subject to the jurisdiction of the Commission * * * shall be just and reasonable * * *" (Sec. 4(a)).

"Whenever the Commission after a hearing * * * shall find that any rate * * * in connection with any * * * sale of natural gas, subject to the jurisdiction of the Commission * * * is unjust, unreasonable * * * the Commission shall determine the just and reasonable rates * * * to be thereafter observed * * *" (Sec. 5(a)).

"Interstate commerce," the Act declares, "means commerce between any point in a State and any point outside thereof * * *" *(Sec. 2 (7))*. This language is without ambiguity.

It is to be observed that while this petitioner is a "natural gas company," as defined in the Act *(Sec. 2(6))* because "engaged in the transportation of natural gas in interstate commerce" and "the sale in interstate commerce of such gas for resale," it is not engaged in such "transportation" as a carrier for hire. *None* of its "rates and charges" are "made, demanded or received * * * for or in connection with the transportation * * * of natural gas." *All* of its "rates and charges" are "for or in connection with the * * * sale of natural gas." Such sales are in two categories: (1) sales for resale, and (2) direct sales to the ultimate consumer. The former, "sales for resale," *in interstate commerce only*, are subject to the jurisdiction of the Commission, while the latter, "direct sales," whether in interstate or intrastate commerce, and "sales for resale" in *intrastate* commerce are not "subject to the jurisdiction of the Commission" in this case.

Thus "the powers of the Commission were defined, and definition is limitation". *(Federal Radio Comm. v. Nelson Bros. Co.*, 289 U.S. 266, 276, 53 Sup. Ct. 627, 632).

The position of this petitioner is that the one and *only* sale for resale by it in *interstate* commerce, that is, "the sale

of natural gas across state lines," *(Federal Power Comm. v. Hope Natural Gas Co.,* 320 U.S. 575, 64 Sup. Ct. 281, 292) is at the "city gate," Cheyenne, Wyoming; and that *all* "city-gate" sales for resale in Colorado are made in *intrastate* commerce. See *Appendix B, this brief.*

This issue is neither considered nor resolved by the Court of Appeals in its opinion. The action of the Commission, in summarily disposing of this question by merely assuming rate-regulatory jurisdiction over *all* operations of Colorado-Wyoming Company, in Colorado as well as at the "city gate," Cheyenne, Wyoming, is adopted in silence by that Court. This petitioner is entitled upon this issue, as well as upon other issues in the case, to a separate, direct and specific judicial consideration and determination thereof, under the terms of the Natural Gas Act, the facts in this record and other controlling law.

The settled law is that "The determination of the extent of authority given to a delegated agency by Congress is not left for the decision of him in whom authority is vested."

Addison v. Holly Hill Fruit Products, Inc. (1944), —— U.S. ——, 64 Sup. Ct. 1215, 1220;

Federal Power Comm. v. Natural Gas Pipeline Co., 315 U.S. 575, 586, 62 Sup. Ct. 736, 743;

Crowell v. Benson, 285 U.S. 22, 56, 52 Sup. Ct. 285, 294;

Federal Radio Comm. v. Nelson Bros. Co., supra.

The facts *uncontroverted in the record* are definite and specific.

Colorado-Wyoming Company purchases its gas supply *in Colorado* (at Littleton) from Colorado-Interstate Gas Company. Such *completed* sale by the latter named company to petitioner is subject to the rate-regulatory authority of the Commission, and that authority has been exercised by the Commission *(Colorado Interstate Gas Co. v. Federal Power Commission, et al.,* 142 F. (2d) 943). *The systems of the two companies are connected solely for the purposes of such sale, purchase and delivery.* The two systems, however, are not "integrated," nor in any manner combined. They are entirely independent in management, control and

operation. Upon this, the record is clear. This is admitted by the Commission in its opinion *(Op. R. V. 1, p. 79)* and by the impressive fact that throughout the proceedings before the Commission and the rate determinations made by it, Colorado-Wyoming Company was of necessity considered and dealt with as wholly separate from and independent of Colorado Interstate Gas Company (save only that the Commission, unsupported by fact or law, resorted to the fiction of "integration" for purposes of its "allocation of cost," so-called). Colorado-Wyoming Company, then an operating company, was no part of nor in any manner considered in the agreed plan of development *(R. V. 3, Ex. 1, p. 7)* of the Texas pipeline to Denver *(Op. of Ct., R. V. 2, pp. 1093-1096) but became merely a purchaser of such gas at a later date because of the unexpected exhaustion of the Wellington Colorado Field (Op. of Ct., V. 2, p. 1096; Comm. Ex. 51, R. V. 3, pp. 1-6).*

BRIEF OF THE ARGUMENT.

At the outset of this argument it is deemed desirable to point out to the Court the position of Colorado-Wyoming Company respecting the operation and effect of the Commission "allocation of costs" here under review. In view of the grave errors of law which, it is submitted, permeate this action of the Commission, the substantial injury in fact and in law to this petitioner and the far-reaching consequences thereof cannot be tabulated accurately in dollars. If, as we believe, the basic legal concept, as well as the erroneous and unsupported assumptions and conclusions of fact upon which the Commission has proceeded, is not that authorized, required or permitted by law, then, as a matter of law, the order cannot stand *(Securities and Exch. Comm. v. Chenery Corp.*, 317 U.S. 80, 63 Sup. Ct. 454, 462).

The Commission distinguishes definitely between "allocation of physical properties" and "allocating costs including the return" *(R. V. 1, 80)*.

It is therefore clear that the Commission, although recognizing in law the necessity of allocation *(R. V. 1, pp. 79-80)*, discards entirely the principle of "allocation of property" and substitutes therefor what it describes as the "allocation of costs." We start then with the admitted fact that there is no "allocation of property" in this case *(R. V. 1, p. 80)*.

The principle of "allocation of property" and the Commission procedure of "allocation of costs," so-called, cannot be made to mean or be the same thing by words of rationalization, however clever.

The contentions of this Company are:

(1) The procedure or so-called "method" adopted by the Commission is without authority of and contrary to law; and

(2) That procedure and "method," as utilized by the Commission in this case, does not reflect either principle, formula or method; and is not predicated upon the actual operations of this Company; and is contrary to the uncontroverted evidence in this case.

(1). The Allocation Required by Law.

We consider first the existing requirements of law respecting allocation. The necessity for apportionment or allocation, according to the use of the property, and the revenues, expenses and income thereof arises from the fact that the properties and operations of the Company are devoted to and cover natural gas service over which the Commission has rate-regulatory authority, "sale in interstate commerce of natural gas for resale" and those over which the Commission does not possess rate-regulatory authority, being all other sales, both "direct" and "resale." Each of the classes of gas service is substantial in volume and in revenue.

The law is settled that the "allocation" herein required is the allocation of the value of the property, and of revenues, expenses and income "used in the regulated business and that used in the unregulated business" *(Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 51 Sup. Ct. 65).

In the *Minnesota Rate Cases*, in which allocation of property was held essential, this Court directly repudiated the Commission procedure of "*allocating costs including the return.*" The case of *Simpson v. Shepard* has not been overruled. We quote from that opinion:

"*The value of the use, as measured by return, cannot be made the criterion when the return itself is in question.* If the return, as formerly allowed, be taken as the basis, then the validity of the state's reduction would have to be tested by the very rates *which the state denounced as exorbitant.* And, if the return as permitted under the new rates be taken, then the state's action itself reduces the amount of value upon which the fairness of the return is to be computed.

"*When rates are in controversy, it would seem to be necessary to find a basis for a division of the total value of the property independently of revenue,* and this must be found in the use that is made of the property. That is, there should be assigned to each business that proportion of *the total value of the property* which will correspond *to the extent of its employment in that business.* It is said that this is extremely difficult; in particular, be-

cause of the necessity for making a division between the passenger and freight business, and the obvious lack of correspondence between ton-miles and passenger-miles. It does not appear, however, that these are the only units available for such a division; and it would seem that, after assigning to the passenger and freight departments, respectively, the property *exclusively* used in each, comparable use-units might be found which would afford the basis for a reasonable division with respect to property used in common." (Emphasis added.)

Simpson v. Shepard, 230 U.S. 352, 33 Sup. Ct. 729, 765.

The necessity for *property* allocation likewise is explicit in the case of *Smith v. Illinois Bell Telephone Co., supra:*

"The separation of the intrastate and interstate property, revenues and expenses of the company is important not simply as a theoretical allocation to two branches of the business. It is essential to the appropriate recognition of the competent governmental authority in each field of regulation. * * * The proper regulation of rates can be had only by maintaining the limits of state and federal jurisdiction, and this can not be accomplished unless there are findings of fact underlying the conclusions reached with respect to the exercise of each authority. In view of the questions presented in this case, *the validity of the order of the State commission can be suitably tested only by an appropriate determination of the value of the property employed in the intrastate business* and of the compensation receivable for the intrastate service under the rates prescribed. * * * As to the value of that property, and as to the revenue and expenses incident to that business, *separately considered*, there should be specific findings. Railroad Commission v. Maxey, 281 U.S. 82, 83, 74 L. Ed. 717, 718, 50 S. Ct. 228." (Emphasis added.)

Smith v. Illinois Bell Telephone Co., 282 U.S. 133, 149, 51 Sup. Ct. 65, 69.

Again this Court, speaking through *Mr. Justice Cardozo:* emphatically held that allocation of property is essential and that any procedure omitting such allocation is arbitrary. We quote:

"* * * *The value of the property devoted to transmission may be measured upon the basis of mileage multiplied by demand.* United Fuel Gas Co. v. Railroad Comm. of Kentucky, supra, where the experts are stated to have agreed upon the method of division. *This does not mean that a like basis will be approved when mileage contributing to the supply is omitted from the reckoning.*" (Emphasis added.)

Columbus Gas & Fuel Co. v. Pub. Utilities Comm., 292 U.S. 398, 408-410, 54 Sup. Ct. 763, 768-769.

See also:

Wabash Valley Electric Company v. Ralph M. Young, et al., 287 U.S. 488, 53 Sup. Ct. 234.

True, the Natural Gas Act does not mention "allocation"; nor did the Commission draft of the Federal Power Act.

In 1935, when the Federal Power Commission appeared before Congress with its legislative proposal, *Section 211 (a)* as drafted (which as changed by Congress became *Section 208* of the Federal Power Act and *6(a)* of the Natural Gas Act), Congress was told certain things. Those who presented the Commission position declared that the section in question "fits right into the picture of the separation of this property between state and interstate use" and specifically that "we (the Commission) know of no way of dividing it other than that specified by the Supreme Court of the United States in the Minnesota rate case * * *."

(Hearings before Interstate Commerce Committee, House of Rep., H. R. 5243, Part 1, p. 505.)

Forgotten, of course, is this recognition of the law of allocation as the law then was and as it now is. Congress, as pointed out, rejected the "program" of the Commission for "the development of the social and economic stability of the United States," largely embodied in *Section 211 (c)* of the draft (as is clearly evident throughout the testimony of *Commissioner Seavey* and *Solicitor DeVane* of the Commission. *Hearings before Interstate Commerce Commission*, H. R. 5243, Part 1, March 7, 8, 9, 12, 13, pp. 382-576), by striking it from the Act in its entirety. The Commission,

as the record of events now unmistakably discloses, nevertheless proceeded with its non-statutory "social and economic" objectives. To facilitate realization of its declared objectives, allocation of property *deliberately* was cast aside and repudiated. Such procedure is not merely contrary to law, it is destructive of the *ordered* and orderly processes of government binding upon the executive, the administrative and the judiciary as well as the citizen.

The necessity for such allocation arises not from the terms or provisions of any statute but from the basic fact that "it is essential" under our constitutional system of government when the rate-regulatory jurisdiction exercised does not embrace all the operations or the facilities in their entirety of the regulated enterprise *(Smith v. Illinois Bell Tel. Co.*, 282 U. S. 133, 148-149, 51 Sup. Ct. 65, 68-69). And, of course, as this Court has many times declared, it is not the function of either Commission or Court "to provide a more comprehensive scheme of regulation than Congress has decided upon." Nor do the Interstate Commerce Act or other federal or state rate-regulatory acts mention "allocation." (See: *Simpson v. Shepard*, 230 U. S. 352, 33 Sup. Ct. 729, 753; *Smith v. Illinois Bell Tel. Co.*, 282 U. S. 133, 51 Sup. Ct. 65; *Columbus Gas & Fuel Co. v. Public Utilities Comm.*, 292 U. S. 398, 54 Sup. Ct. 763).

The controlling principle of "property allocation" is a requirement and command of law. It is perfectly obvious that "allocation" reaches the very heart of and controls directly the amount of the order of reduction herein involved.

That the legal principle of "allocation of property" was the settled and established law of the land, March 18, 1942, when the order of the Commission herein was promulgated *(R. V. 1, p. 84)*, there is not the slightest doubt. Such Commission action, therefore, constituted a deliberate attempt to overrule and repeal existing law and legislate by order or edict in conformity with its own theories and desires. The Commission, of course, was not and is not vested by law with any power or authority to make or create law. *That action*, therefore, involved more than administrative finality; *it was administrative supremacy* in that this Court now is urged by the Commission to validate retroactively

the lawlessness of its order of March 18, 1942. Such are the actual conditions confronting this Court, and such would be the legal effect and consequence of an order of this Court permitting the order of the Commission to stand.

Whether this Court *now;* lawfully and in harmony with our constitutional structure of government, may change the established, controlling and applicable principles of governing the allocation of property and operations by overruling its earlier decisions above referred to, certainly is a question attended with serious doubt. This is true, for Congress, the constitutional legislator, as this Court took occasion to point out in the *Hope Natural Gas Company* case, has acted and has made its purposes and intentions crystal clear in that behalf.

See,

Milk Wagon Drivers' Union v. Lake Valley F. Products, 311 U. S. 91, 103, 61 Sup. Ct. 122, 128;

United States v. South Eastern Underwriters Assn., (July 1944), —— U. S. ——, 64 Sup. Ct. 1162, 1175-1176, 1178;

Carmichael v. Southern Coal & Coke Co., 301 U. S. 495, 510, 57 Sup. Ct. 868, 872-873.

The issue *particularly* here presented is quite different and even more fundamental: May the Federal Power Commission without vestige of authority overrule this Court *in 1942,* and can this Court *in 1945* permit itself retroactively to acquiesce in and approve such a procedure? The point here involved is not, may this Court with propriety overrule its own decisions. The issue is the basic illegality of the Commission opinion and order overruling the decisions of this Court.

(2). The Commission "Allocation of Costs" is not predicated on "facts" and is not based upon the jurisdiction of the Commission under the Act.

Even if it be assumed for the purposes of this discussion, that some sort of an "allocation of costs" is permissible as a matter of law, yet *any* procedure followed must reflect the facts and factors of the operations of this Company, the

utility involved and affected by the Commission action in question, and such procedure also must be responsive to the statutory grant and denial of rate regulatory authority. That is, any such procedure must conform to controlling law and must be in harmony with the uncontroverted record facts relating to this Company and its operations. Otherwise, the action of the Commission becomes purely fortuitous, that is, self-willed. Such a "method" is a travesty upon the ordered and orderly processes of our constitutional government. True, administrative agencies are possessed of "discretion," but that discretion is controlled and limited by, and cannot supplant, the principles embodied in our system of government by law and expressly and affirmatively declared in the Natural Gas Act. If administrative action is not to be final and supreme, the courts must assume and exercise the fundamental judicial duties of review delegated to and imposed upon them by the Constitution, by legislative enactment and by the orderly and established growth of our institutions. The foregoing principles which control those who exercise public authority cannot be dismissed as "truisms," for only by the application of those precepts will American constitutionalism be preserved.

We are here considering the *facts essential* to and circumscribing the lawful action of the Commission. This inquiry is *not* to ascertain whether the evidence is slight or substantial. The question here presented is *not* as to the weight which should or could be attributed to evidence. *The bald issue under consideration is whether the Commission action respecting "allocation" is without evidence to support it or contrary to the uncontroverted relevant evidence in this record.* There are no findings of fact respecting the foundation facts, either in the opinion or the order under review *(R. V. 1, pp. 79-80, 82-83, 94-97)*. There are generalities and argumentative assertions and conclusions only. The entire position of the Commission on the principle of allocation is one of *ipse dixit*, and nothing else.

We summarize (see detailed consideration, *supra*) the *essential* facts, without which and contrary to which the Commission proceeded:

1. The Commission gave no effect whatever to the *un-*

disputed fact that the entire capacity of the system of this company is required to satisfy "peak day demands" of domestic consumers.

2. The Commission ostensibly for the purpose of measuring the relative "peak day demands" of the regulated "sales for resale" and the unregulated "direct sales" consumers as provided in the Act, *did not:*

(1) Adopt or even consider the "peak day" deliveries *to* or *by the system of this Company,* on February 9, 1939, or at any other time.

(2) Apportion in any manner, or at all, "deliveries" *to* or *by* this Company, or any other Company, between "sales for resale" and "direct sales," the ratio of which on February 9, 1939, was 83.5% to 16.5%. The only *attempted* Commission apportionment was between *direct and resale* industrial business, on the one hand, and *all* other sales on the other, the ratio of which on February 9, 1939, was 65.1% to 34.9%. The substantial difference between these ratios, when apportioned between "volumetric" and "capacity" costs, by whatever the Commission's undisclosed device was, produces widely variant results in the "excess earnings" of the *regulated* business. The Commission device, of course, operates *to increase greatly* such "excess earnings" of the regulated business. This makes the ordered rate reduction larger, and thus the "end result" directly is affected adversely to this petitioner.

3. The Commission staff "apportionment" (aside from non-compliance with the jurisdictions granted and withheld by the Act) is not accurate but consists merely of guesses, estimates and purported averages. This *the Commission evidence* which is in conflict with itself, manifests. There is no conflict whatever in the evidence on this matter.

4. The Commission declared that "the modification" of "method" adopted by it,—the demand on the system peak day of Colorado Portland Cement Company, largest industrial customer of this Company,—in some undisclosed man-

ner was used *(R. V. 1, p. 82)*. This the Commission did not do, and could not do, because on the *assumed* system peak day of February 9, 1939 (and during the entire month of February, 1939) the Cement Company received no gas whatever. This is established without contradiction *by Commission evidence*. Why such asserted "modification" was adopted as a matter of principle or "method" is not disclosed! What the relevancy thereof was to any scheme of "allocation" is not explained! Nor is it told how no use and no demand whatever, at a stated time, could be twisted into a "demand on the system peak day" in some undisclosed amount. If language means anything, "demand" cannot mean "no demand." In short, zero is not a demand; it is the entire absence of demand.

5. The Commission classification, apportionment and division of "costs" into "volumetric" and "capacity" costs does not result from the nature of those "costs." That is, whether a cost quoted is in fact "volumetric" or "capacity" in essential characteristics. Such so-called determination by the Commission and its staff was stated to be a matter of "judgment," but without a statement or explanation of the factors which influenced that "judgment." "Judgment" or "discretion" *under such circumstances*, being uncontrolled and unmeasured, becomes purely fortuitous. Thus the "method" is a device merely. Thereby the Commission is enabled to shift, sort and apportion such "costs" in the manner as it elects as between the two categories. The result is that the amount of the ordered reduction can be and is varied at will to accomplish whatever result the Commission may seek to attain. It is perfectly clear that "allocation" reaches the very heart of and controls directly the amount of the order of reduction herein involved.

6. As to the extent of the geographical rate-regulatory jurisdiction of the Commission in this case, the opinion is silent *(R. V. 1, p. 52)*. The Commission assumed that the situation in a "system extension" case *(Sec. 7 of the Act)*, as presented in the case of a *100% owned subsidiary and its parent company (Illinois Natural Gas Co. v. Central Illinois P. S. Co.*, 314 U.S. 498, 62 Sup. Ct. 381) is controll-

ing in this rate case. The determination in that case that the *subsidiary* company there involved was "a natural gas company" under the Act does not establish rate-regulatory jurisdiction in this case *over* Colorado "sales for resale" operations of this Company. Colorado-Wyoming Company admittedly is "a natural gas company" under the Act, but, under the Act, the rate-regulatory authority of the Commission extends *only* to *that part* of the operations of "a natural gas company," which in fact constitute "the sale *in interstate commerce* of natural gas for resale * * *" *(Sec. 1 (b))*. "'Interstate commerce' means commerce between any point in a state and any point outside thereof" *(Sec. 2 (7))*.

In the case referred to, the parent company, Panhandle Eastern, was engaged in interstate commerce. So the "wholly owned subsidiary," Illinois Natural, which was directly operated as a department or district of the parent company, also was a part of the interstate commerce activities of the parent company. In *this* case there is no relation of parent or affiliate between Colorado-Wyoming Company and Colorado Interstate Company. In *this* case there is no joint or common operation engaged in by Colorado-Wyoming Company and Colorado Interstate Company. In *this* case Colorado Interstate Company has nothing whatever in any way to do with the management, operation or control of this Company. The two-as-one doctrine of corporate identity, definitely applicable in the Panhandle Eastern-Illinois Natural system, has no application to the separate and independent systems of *this* Company and Colorado Interstate Company, which latter companies are equally separate and independent as a matter of law. The two-as-one doctrine being in fact applicable to Panhandle Eastern-Illinois Natural, that doctrine was equally applicable and was applied to that system by the Commission in the Panhandle Eastern "rate case." The rate reduction order in that case *by formal finding* treated Panhandle Eastern and Illinois Natural as one corporation, for the reason *(not present in this case)* that those two corporations "are under common control and ownership, and are operated as a single, interconnected and integrated system for the production, gathering, transportation, sale and delivery of natural gas" *(Detroit v. Pan-*

handle Eastern Pipe Line Company (F.P.C. 1942), 45 P.U.R. (n.s.) 203, 207-208, 222).

See,

Panhandle Eastern Pipe Line Company v. Federal Power Comm., 143 Fed. (2d) 488, 490.

Colorado-Wyoming Company purchases *all* of its *gas in Colorado,* of which about 98% thereof is purchased at the Littleton (Colorado) "gate" from Colorado Interstate Gas Company. Such purchase at Littleton is a complete transaction when the gas is metered and delivered by the Colorado Interstate Company to this Company. *Being a consummated sale, the Federal Power Commission has fixed and determined the "just and reasonable" Littleton "gate" price.* The fixation of the Littleton "gate" price or rate was accomplished in *a rate case* in which this Company was not concerned *(R. V. 1, pp. 90-94)* and which the Commission *admits* was "separate and distinct" from any rate regulation of this Company *(R. V. 1, p. 79)*. None of the natural gas so received by this Company *as* the purchaser thereof at Littleton, and thereafter sold *in Colorado* was transported or sold across state lines. This Company had nothing whatever to do with any natural gas of Colorado Interstate Company. It is only with respect to natural gas after sale *by that Company* and after delivery *to this Company,* i.e., natural gas belonging to and owned by this Company, that this Company exercises any control or dominion whatever. After such sale, the Colorado Interstate Company exercises no control or dominion whatever. There is *no evidence* in this record whatever from which it *could* be concluded that Colorado-Wyoming Company had or has any part or participation in the slightest degree in the production of natural gas in the Texas-Panhandle Field or in the transportation of that gas from Texas to Colorado and the Littleton "gate." While the Commission rendered lip service to the acknowledged fact that "the question of jurisdiction is one of fact and law" *(R. V. 1, p. 51)*, it thereafter deals with the question on the basis of its own self-sufficiency and uncontrolled "discretion." There are no findings of fact, simply assumptions. What are the assumptions indulged? Just this—after referring to the three companies as "separate operating entities" and stat-

ing the fact of and necessity for "three separate and distinct rate cases," the opinion asserts "However, to stop there is to ignore realities." What "realities"? According to the Commission, "The entire project *although involving facilities of three corporate entities is for all practical purposes a single project* now designed to produce, gather, transmit and sell natural gas from the Texas-Panhandle field to consumers along the line as far north as Cheyenne, Wyoming." This is clearly a conclusion which must find its justification *in facts.* What are the undisputed record facts?

This petitioner, Colorado-Wyoming Gas Company, is entirely separate and independent in structure, management, control and operation from Colorado Interstate Gas Company and Canadian River Gas Company, and throughout the proceeding was so recognized by the Commission as wholly separate from and independent of those two companies *(R. V. 1, pp. 45-79).* The petitioner is and has been *merely a purchaser* of gas from the Colorado Interstate Gas Company and nothing else at any time. This petitioner has no part, in fact or in law, in the production of natural gas in Texas by Canadian River Gas Company or in the transportation of such gas from Texas to the Littleton (Colorado) "gate" by Colorado Interstate Gas Company. This entire and complete independence of the three companies is recognized throughout the opinion and the order of the Commission in this case, *save only with respect to "allocation of costs," so-called.*

If the *three* companies are separate, distinct and independent projects in fact and in law, and three "separate and distinct rate cases" are "*necessary,*" as the Commission concedes *(R. V. 1, p. 79),* then what principle of law *permits* the Commission directly to reverse itself, that is, to conclude that it is "necessary" to treat the three "separate, distinct and independent" companies as a single project for purposes of allocation?

The argument advanced is simply one of convenience to the effect that if the rates of Canadian River Gas Company, the producing company are "unjust, unreasonable," then, since Canadian River Gas Company must reduce its rates

to Colorado Interstate Gas Company, Colorado Interstate Gas Company must in turn reduce its rates to Colorado-Wyoming Company. The generalized conclusion of the Commission is a *non sequitur*. It does not follow that "the rates of Canadian Company cannot be altered without simultaneously affecting the reasonableness of the rates of Colorado Company. Likewise, the rates of Colorado Company cannot be altered without affecting the rates of Wyoming Company" *(R. V. 1, p. 79)*. A reduction in the rates of Canadian River Gas Company *may* or *may not* indicate and require a reduction in the rates of Colorado Interstate Gas Company. Whether or not that result follows depends upon the business, operations and profits of Colorado Interstate Gas Company *only*. And, similarly, a reduction in the rates of Colorado Interstate Gas Company to Colorado-Wyoming Company does not *necessarily* affect the rates of Colorado-Wyoming Company. Again, that can be determined *only* from examination of the business, operations and profits of Colorado-Wyoming Company. The recognition by the Commission of the necessity for "three separate and distinct rate cases," one for each of the three companies, is proof that the rates of the three companies are not related as a matter of law. The amount paid for natural gas by Colorado Interstate Gas Company or Colorado-Wyoming Company is *a fact*. In a rate case relating to the particular company whose rates are under consideration, *that fact* is evidence relevant to the determination of whether the rates should or should not be reduced in such rate case.

What the Commission in fact did was to discard and repudiate the entire separation and independence of this Company *in fact and in law* from Canadian River Gas Company and Colorado Interstate Gas Company. It did this without reference to the general and settled law prohibiting any such procedure and without any legal explanation of why that law is not here controlling. Colorado-Wyoming Company is a segregated enterprise and must be so treated *(Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 151, 51 Sup. Ct. 65, 70).

The failure of the Commission to make appropriate and responsible findings, its failure to base the order itself upon

evidence, and its failure to conform to its statutory charter of authority and other settled and established law of the land, each is error as a matter of law, which requires reversal of the decree of the Court of Appeals and vacation of the Commission order. This Court repeatedly has so declared.

"• • • It is impossible to say, that the standards which we have set forth were applied to the facts in this record. Hence, as in Florida v. United States, 282 U.S. 194, 215, 51 S. Ct. 119, 125, 75 L. Ed. 291, the defect is not merely one of the absence of a 'suitably complete statement' of the reasons for the decision; it is the 'lack of the basic or essential findings required to support the Commission's order.' And see United States v. Baltimore & Ohio R. Co., 293 U.S. 454, 464, 55 S. Ct. 268, 272, 79 L. Ed. 587; United States v. Chicago, M. St. P. & P. R. Co., 294 U.S. 499, 510, 511, 55 S. Ct. 462, 467, 79 L. Ed. 1023. Congress has made a grant of rights to carriers such as appellee. Congress has prescribed statutory standards pursuant to which those rights are to be determined. Neither the Court nor the Commission is warranted in departing from those standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen. *Congress has also provided for judicial review as an additional assurance that its policies be executed.* That review certainly entails an inquiry as to whether the Commission has employed those statutory standards. If that inquiry is halted at the threshold by reason of the fact that it is impossible to say whether or not those standards have been applied, then that review has indeed become a perfunctory process. If, as seems likely here, an erroneous statutory construction lies hidden in vague findings, then statutory rights will be whittled away. *An insistence upon the findings which Congress has made basic and essential to the Commission's action is no intrusion into the administrative domain.* It is no more and no less than an insistence upon the observance of those standards which Congress has made 'prerequisite to the operation of its statutory command.' Opp Cotton Mills, Inc., v. Administrator, 312

U.S. 126, 144, 61 S. Ct. 524, 532, 85 L. Ed. 624. Hence that requirement is not a mere formal one. Only when the statutory standards have been applied can the question be reached as to whether the findings are supported by evidence. * * *." (Emphasis added.)

United States v. Carolina Freight Carriers Corp., 315 U.S. 475, 488-489, 62 Sup. Ct. 722;

Wichita R. & L. Co. v. Public Utilities Comm. (1922), 260 U.S. 48, 58-59, 43 Sup. Ct. 51, 55;

Beaumont Sour Lake, etc. Co. v. United States, 282 U.S. 74, 86, 51 Sup. Ct. 1, 6, and cases cited;

Morgan v. United States, 298 U.S. 468, 479-481, 56 Sup. Ct. 906, 911-912;

Securities and Exchange Comm. v. Chenery Corp., 317 U.S. 80, 94-95, 63 Sup. Ct. 454, 462;

Interstate Commerce Commission, et al. v. Columbus and Greenville Railway Company, 319 U.S. 551, 560, 63 Sup. Ct. 1209-1213;

Federal Power Comm. v. Natural Gas Pipeline Co., 315 U.S. 575, 586, 62 Sup. Ct. 736, 743.

Under controlling law and the facts in this record, Colorado-Wyoming Company, as a segregated and independent enterprise, is not a part of the Texas natural gas production nor of the Texas-Colorado interstate carriage of natural gas. It purchases *all* of its natural gas requirements in Colorado, and the only natural gas which it handles or transports *in interstate commerce* is that sold for resale at the Cheyenne, Wyoming "city-gate." None of the natural gas sold by this Company in Colorado enters at any time into "interstate commerce," as expressly defined in the Act. Under the Act and the fundamental law of the land, there must be then a separation, apportionment and "allocation" of all Colorado business and operations from the "sales for resale" business and operations at Cheyenne, Wyoming, over which alone the Commission is granted rate-regulatory authority.

Thus, the Commission "allocation of costs" is not based on the facts, factors and operations of this Company, but is predicated upon *assumptions* and argumentative con-

clusions which are not supported by "substantial evidence" or any evidence, and in several instances are contrary to the record evidence as presented by the Commission itself.

It is, of course, evident, from the Commission opinion *(Op. R. V. 1, pp. 79-80, 82-83)*, that the foundation and basis of the Commission allocation is not disclosed, and that the basic and responsible findings required by law are absent. Neither the Court nor anybody else can, by examination of the opinion, ascertain or even approximately guess the facts relied upon by the Commission or the technique and method of computation employed by it. The staff, "principles and methods," the Commission declares, "*are adopted with the modification* that the coincident demands of all customers on the system peak day *(Note:* Not of Colorado-Wyoming Company) are used, and with exception of deliveries to Highway Gas Company" *(Op. R. V. 1, pp. 82-83)*. How and in what manner the technique, method and computations of Commission staff witness *Lyon (Comm. Ex. 227, R. V. 3)* were altered or changed, by the so-called "modification," is not disclosed or discernible. There are no findings. The Commission states that the modification was made, next states the final result, and nothing else. It is entirely clear also that the jurisdictional restraints of the Natural Gas Act are disregarded and the established principles of law governing allocation are discarded.

The principle controlling the judicial review of federal administrative agencies, such as the Federal Power Commission, was aptly and succinctly declared many years ago by *Chief Justice White* speaking for this Court:

"* * * It is, of course, true, as pointed out in Interstate Commerce Commission v. Illinois C. R. Co., 215 U.S. 452, 470, 54 L. ed. 280, 287, 30 Sup. Ct. Rep. 155, and since repeatedly applied, that findnigs of fact made by the Commission within the scope of its administrative duties must be accepted in case of judicial review, but that doctrine, as was also pointed out, does not relieve the courts in a proper case from determining whether the Constitution has been violated or whether statutory powers conferred have been transcended, or have been exercised in such an arbitrary way as to amount to the ex-

ertion of authority not given—doctrines which but express the elementary principle that an investiture of a public body with discretion does not imply the right to abuse, but, on the contrary, carries with it as a necessary incident the command that the limits of a sound discretion be not transcended; which, by necessary implication, carries with it the existence of judicial power to correct wrongs done by such excess. * * *"

United States v. Atchison, T. & S.F.R. Co., 234 U.S. 476, 34 Sup. Ct. 986, 993.

CONCLUSION.

Such a situation as is disclosed in the record here under review highlights both the fatal infirmity of and the serious danger inherent in the Commission procedure and practices of which we complain. If Commission action in any case is to be subject to real, even though "limited," "judicial" review, this is such a case. Such review has not been accorded this petitioner.

Respectfully submitted,

DONALD C. MCCREERY,
PAUL W. LEE,
GEORGE H. SHAW,
WM. A. BRYANS, III,
CHARLES J. KELLY,
1217 First National Bank Bldg.,
Denver, Colorado,
Attorneys for Colorado-Wyoming Gas Company, Petitioner.

APPENDIX A.

Pertinent Sections of the Natural Gas Act. (15 U. S. C, 717.)

NECESSITY FOR REGULATION OF NATURAL GAS COMPANIES.

Section 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to S. Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

RATES AND CHARGES, SCHEDULES, SUSPENSION OF NEW RATES.

Section 4. (a) All rates and charges made, demanded or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

* * * * * * *

(e). * * * At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION.

Section 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. * * *

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

ASCERTAINMENT OF COST OF PROPERTY.

Section 6. (a) The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property.

(b) Every natural-gas company upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction.

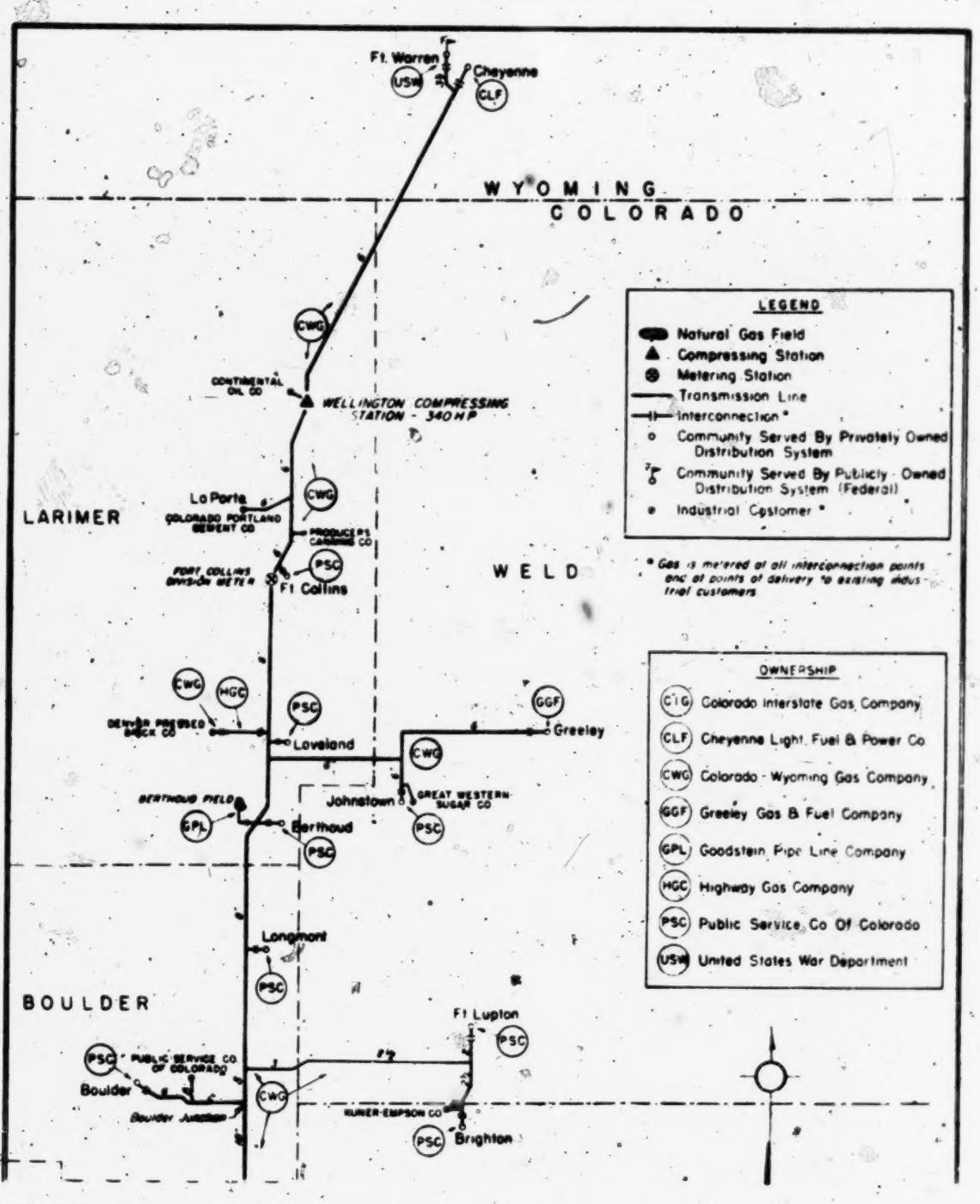
REHEARINGS, COURT REVIEW OF ORDERS.

Section 19. (b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall

be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

Note:—Section 19 (b) of the Natural Gas Act is identical, word for word including punctuation, with the "Court Review of Orders" sections of the "Public Utility Holding Company Act of 1935" and the "Federal Power Act" (1935), to-wit: Section 24 (a) and Section 313 (a) thereof, respectively.

APPENDIX B.



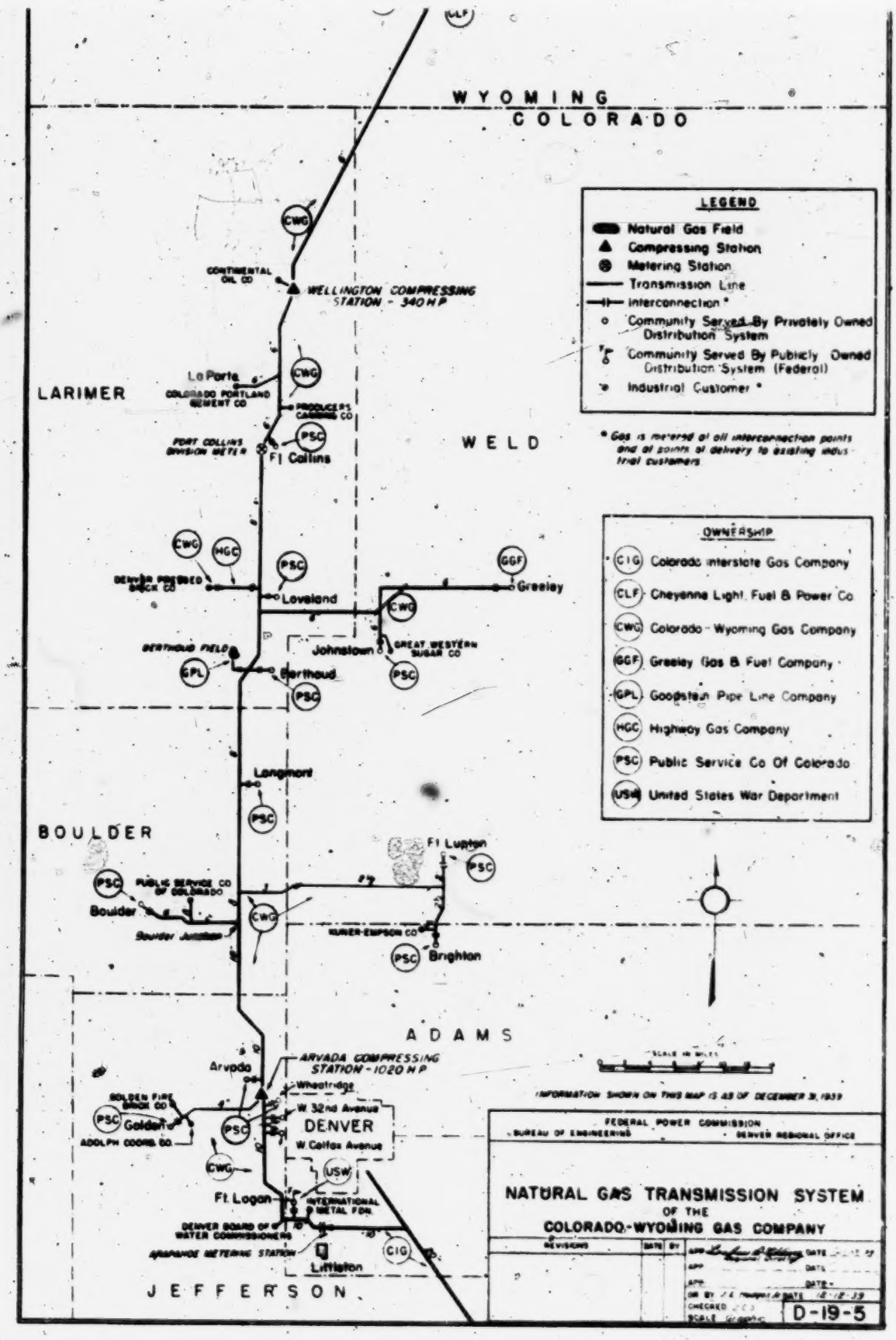


EXHIBIT NO. 50

APPENDIX C.

THE SCOPE AND DUTY OF JUDICIAL REVIEW RESTING ON THE COURT OF APPEALS UNDER THE NATURAL GAS ACT AND OTHER CONTROLLING LAW OF THE LAND.

The Act *(Appendix A)* specifically requires "a hearing" as a condition precedent to action, which hearing under our system of government is a term of substance, and clearly imposes the burden of proof on the Commission itself. *(Pub. Serv. Comm. v. Colorado-Wyoming Gas Co.* (F. P. C.) 43 P. U. R. (n. s.) 205, 231.) This apparently is recognized by that Court also. *(Colorado Interstate Gas Co. v. Federal Power Comm.*, 142 F. (2d) 943, 954.)

Moreover, there never has been any doubt about the meaning of the statutory language "whenever the Commission after a hearing * * * shall find that any rate * * * is unjust, unreasonable * * * *(Sec. 5(a))*. *Mr. Justice Brandeis* in a confiscation case, speaking for this Court, declared:

> "Congress by using the phrase 'whenever the Commission is of opinion, after hearing', prescribed quasi judicial action. Upon application of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest. It may form this judgment only after hearing. *The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it.* To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action." (Emphasis added.)
>
> *The Chicago Junction Case*, 264 U. S. 258, 265; 44 Sup. Ct. 317, 319-20.

The foundation of the Commission "rate making function" is largely factual as pointed out by this Court in the *Hope Natural Gas Co.* case, *supra (Secs. 6-8, 9, 10 and 14)*.

Hearings, appropriate records thereof, and governing rules of procedure, contemplate a full and complete trial of all relevant issues of fact and law *(Secs. 15 and 16)*.

The provision for rehearing before the Commission pro-

vides that such application "shall set forth *specifically* the ground or grounds upon which such application is based," not merely a general objection that the finding of "unreasonableness" is "arbitrary" *(Sec. 19(a))*. Thus the Commission is given opportunity to correct its errors, on the assumed concept that "true wisdom always is discreet, and not ashamed of wise retreat."

The judicial review *before that Court*, predicated *solely* upon the "transcript of the record" before the Commission (See *Appendix A, post)*, provides: (1) "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing * * *," which means that all such objections so urged shall be considered by the reviewing Court; (2) "The finding of the Commission as to the *facts, if supported by substantial evidence*, shall be conclusive," or conversely, if not supported by "substantial evidence," cannot stand; (3) a party, on proper showing, may be permitted by Court order "to adduce additional evidence" before the Commission; (4) in such event, "The Commission may modify its *findings as to the facts* * * * and it shall file with the Court *such modified or new findings*, which if supported by substantial evidence, shall be conclusive, *and its recommendation*, if any, for the modification or setting aside of the original order;" and (5) "The judgment and decree of the Court, affirming, modifying or setting aside, *in whole or in part*, any such order of the Commission, shall be final * * *" *(Sec. 19(b))*. Herein *in plain language* the statute provides that usual and ample statutory review of rate making orders of administrative agencies, developed and established by long legislative and judicial practice and the undoubted applicable law of the land at the time of the passage of the Natural Gas Act.

The Congressional purpose and intent is made clear beyond any doubt. As declared by this Court in the *Hope Natural Gas Co.* opinion, "The Committee Report stated that the Act provided 'for regulation along *recognized* and more or less standardized lines' and that there was '*nothing novel in its provisions*', H. Rep. No. 709, *supra*, p. 3. * * * Sec. 4(a) and Sec. 5(a) contain only the conventional stand-

ards of rate making for natural gas companies." (320 U. S. 575, 64 Sup. Ct. 281, at page 294) (Emphasis added.)

What then was the state of the law with respect to the essential scope of review of rate-regulatory orders of administrative agencies, *at the time* of the passage of the Federal Power Act (1935) and the Natural Gas Act (1938).

The case of *St. Joseph Stock Yards Co. v. United States* (1936), 298 U. S. 38, 56 Sup. Ct. 720, embodies a complete discussion of the law of the land, by *Mr. Chief Justice Hughes* (298 U. S. 51) and by *Mr. Justice Brandeis* (298 U. S. 74-75). This Court in that case was reviewing an order of the Secretary of Agriculture fixing rates under authority of the Packers and Stockyards Act (1921), (42 Stat. 159, 7 U. S. C., Secs. 181-229), on suits to restrain and annul such order in accordance with the provision which Congress had made for reviewing orders of the Interstate Commerce Commission.

Speaking for this Court, *Chief Justice Hughes* declared (pp. 725-726):

"When the Legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are especially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily. * * * In such cases the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority."

* * * * *

"Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. * * * Under our system there is no warrant for the view that

the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority."

Mr. Justice Brandeis, who certainly cannot be charged with ever overstating or enlarging the *necessary and minimum* scope of review, even in a confiscation case, declared, in his concurring opinion (pp. 735-736):

"'* * * Is there anything in the Constitution * * * that prohibits Congress making findings of fact by a highly trained and especially qualified administrative agency likewise conclusive, *provided they are supported by substantial evidence?*' (Emphasis added.)

* * * * *

"An order of the Secretary may, of course, be set aside for violation of the due process clause by prescribing rates which, on the facts found, are confiscatory; for the order of an administrative tribunal may be set aside for any error of law, substantive or procedural. * * * Moreover, where what purports to be a finding upon a question of fact is so involved with and dependent upon questions of law as to be in substance and effect a decision of the latter, the Court will, in order to decide the legal question, examine the entire record, including the evidence if necessary, as it does in cases coming from the highest court of a state. * * * It may set aside an order for lack of findings necessary to support it, * * * or because findings were made without evidence to support them, * * * or because the evidence was such 'that it was impossible for a fair-minded board to come to the result which was reached,' * * * or because the order was based on evidence not legally cognizable, * * * or because facts and circumstances which to have been considered were excluded from consideration, * * * or because facts and circumstances were considered which could not legally influence the conclusion, * * * or because it applied a rule thought wrong for determining the value of the property. * * * These cases deal with errors of law or irregularities of procedure."

The foregoing authoritative judicial declarations are supported by a cloud of decisions of all the courts of the land. Arbitrary action, whether judicial or quasi-judicial, cannot stand—that is: action without adequate determining principle; action, not supported by reason or logic; action, predicated on desire or will; action, which flows from refusal to hear, refusal to heed or neglect to give "substantial evidence" the weight it manifestly carries; action, ignoring the "indisputable character of the evidence"; and action grounded upon misconception of or defiance of controlling law. True, it is not incumbent upon or within the authority of that Court to "weigh evidence" or to rule upon "the wisdom" of the Commission action, *within the limits of the statutory authority of that body,* which has no roving commission either to declare national policy, make law or overrule existing law. It must be conceded that the Commission, in the hearing and determination of issues such as here are presented, sits as a quasi-judicial body under the limitations of a court, and in the process of fact finding is controlled by the same factors as other triers of the fact weighing the probative force of evidence. That the members of the Commission are appointed by law on the basis of actual or supposed experience does not alter the manner in which the functions of the Commission are to be *performed and measured.* The Act in all its pertinent provisions, respecting hearing, determination, order and review, so directs unmistakably.

In view of the foregoing, it cannot be that the *duty* of review imposed on that Court by the Act may be discharged by a mere process of attempted rationalization and a categoric blanket finding that the *ultimate conclusion* of "unreasonableness" *(Comm. Order, R. V. 1, p. 84)* is not arbitrary *(R. V. 2, p. 1114).*

"Findings as to the facts" and ultimate conclusions such as the conclusion of "unreasonableness" are quite different and always have been clearly differentiated by this Court and all other courts, federal and state. (See, *Baumgartner v. United States* (1944), 64 Sup. Ct. 1240.) Conclusions are of value when they are proven, and only then. As a matter of fact, that wide difference between facts and conclusions

currently is expressly acted upon in other circumstances, under similar or identical statutory reviews. If the rates under review are "unreasonable," they are "unreasonable" in a *measured* amount, and such measured amount is ascertained by the specific and cumulative determinations of fact and law necessarily incident to a "rate case." The conclusion of "unreasonableness," therefore, is neither an independent finding nor a finding at all; so, consequently, the ordered rate reduction—the only formal Commission action taken—must fall if either the basic factual or legal foundations thereof are insufficient or erroneous. Such is the specific mandate of the statute to that Court, and such appears to be the concurring view of this Court in *Federal Power Comm. v. Natural Gas Pipeline Co.*, 315 U. S. 575, 586, 62 Sup. Ct. 736, 743, where that Court, speaking through *Chief Justice Stone*, declared:

> "The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, *proper findings made* and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been over-stepped. If the Commission's order, *as applied to the facts before it* and viewed in its entirety, produces no arbitrary result, our inquiry is at an end." (Emphasis added.)

The established and accepted scope of review then (and the opinion in the *Hope Natural Gas Company* case purports to follow and rely upon the foregoing announcement in the *Natural Gas Pipeline Company* case) comprehends compliance with the following: (1) "He who decides must hear," that is, must have an open mind to the issues in the particular case, unhampered by any predetermination or by non-existent statutory policies and objectives; (2) Constitutional rights must be regarded, not explained away; (3) Statutory powers, duties and limitations must be observed; and (4) the specific evidentiary foundations for the findings,

conclusions and order must be supported in the record. (See *Securities and Exchange Comm. v. Chenery* (1943), 317 U. S. 80, 63 Sup. Ct. 454, 459, 462; *United States v. Carolina Freight Carriers Corp.* (1942), 315 U. S. 475, 489, 62 Sup. Ct. 722, 730; *Federal Power Comm. v. Natural Gas Pipeline Co.* (1942), 315 U. S. 575, 586, 62 Sup. Ct. 736, 743; *Addison v. Holly Hill Fruit Products, Inc.* (1944), —— U. S. ——, 64 Sup. Ct. 1215, 1220).

This Court consistently throughout its history has insisted that while it is no part of the judicial function to inquire "whether the administrative power has been wisely exercised," this Court "must consider" and measure administrative action by "the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power." This Court also repeatedly has declared "We must decide whether the action of the court below was correct, irrespective of the reasoning by which such action was induced."

> "Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) a proposition which we state independently, although in its essence it may be contained in the previous one, *viz.*, whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. Postal Teleg. Cable Co. v. Adams, 155 U. S. 688, 698, 39 L. ed. 311, 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360."
>
> *Interstate Commerce Commission v. Illinois Central Railway Company*, 215 U. S. 452, 30 Sup. Ct. 155, 160.

The decisions quoted and cited, *supra*, hold that if the record discloses that the Commission has proceeded with-

out supporting evidence or without warrant of law, no conclusion which the Commission reaches upon such improper basis can convert that wrong into right. It is only after the several specific determinations of material issues of fact have been found to be supported by "substantial evidence", and in conformity with controlling law that the Court of Appeals and this Court reach the realm of "total effect" or "entirety." *(Los Angeles Gas & Elec. Corp. v. Railroad Comm.*, 289 U. S. 287, 53 Sup. Ct. 637.)

Let there be no misunderstanding, the issues herein presented do not reflect mere "theory," "infirmities," "method" or "errors of reasoning;" they involve those fundamental matters and that very course of procedure detailed by *Mr. Justice Brandeis, supra*, as rendering an administrative order *totally invalid*, even in a confiscation case.

It is clear, therefore, that the direct function imposed by the Act *upon that Court*, as the court of primary review, specifically is to ascertain whether the findings and conclusions of the Commission and its order pursuant thereto meet the statutory requirements. Where powers and duties are delegated to an administrative agency, that agency may act only in accordance with such controlling statutory authority and standards. Otherwise, administrative action becomes self-willed and supreme over the legislative will and all legal restraint. (See *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 489.)

Congress in *Section 19(b)* of the Act "set out a criterion" to govern both the Commission and that Court on review, to-wit: "The finding of the Commission as to facts, if supported by substantial evidence, shall be conclusive." This also is the holding of the Circuit Court of Appeals for the District of Columbia, in the case of *Saginaw Broadcasting Co. v. Federal Communications Comm.*, 96 F. (2d) 554, 559 (Certiorari denied). (See, also pp. 558-561 and decisions there cited.) Therein that Court, in the statutory judicial review of the Commission orders under the Communications Act of 1934, 47 U. S. C. A., parag. 402(b) (1) declared that "Thereby the Act has set out a criterion to govern the Commission * * *." The review section under that Act is iden-

tical in purpose and meaning with *Section 19(b)* of the Natural Gas Act.

"* * * Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." * * * It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' *(National Labor Relations Board v. Columbian E. & S. Co.,* 306 U. S. 292, 299, 300, 59 S. Ct. 501, 505, 83 L. Ed. 660; *Consolidated Edison Co. v. National Labor Relations Board,* 305 U. S. 197, 59 S. Ct. 206, 83 L. Ed. 126; *Continental Oil Co. v. National Labor Relations Board,* 10 Cir., 113 F. (2d) 473, 481.)"

National Labor Relations Board v. Standard Oil Co. (C. C. A. 10), 124 Fed. (2d) 895, 903.

The Congress evinced no intention whatever to delegate a freedom and immunity from review by the Court of Appeals to the Federal Power Commission not possessed by other administrative bodies, such as the Securities and Exchange Commission, the Interstate Commerce Commission and the Secretary of Agriculture under the Packers and Stockyards Act. In fact, as we have seen, the Congress clearly and expressly declared it intended not to depart from the then "recognized," "standardized" and "conventional" law on the subject. Congress provided the same judicial review accorded with respect to the action of other federal administrative agencies, and neither the Commission nor the courts are warranted in departing therefrom because of doubts respecting, or disagreement with, the legislative course Congress has chosen.

For example, the "Court Review of Orders" of the Securities and Exchange Commission is authorized by *Section 24(a)* of the "Public Utility Holding Company Act of 1935" (U. S. C. A., Title 15, Sec. 79x; C. 687; 49 Stat. 834). *Section 24(a)* of that Act is *identical* in language and in punctuation with *Section 19(b)* of the Natural Gas Act. They are the same, word for word.

In *Securities and Exchange Comm. v. Chenery Corporation* (1943), 317 U. S. 80, 63 Sup. Ct. 454, this Court, speaking through *Mr. Justice Frankfurter*, declared:

"Congress has seen fit to subject to judicial review such orders of the Securities and Exchange Commission as the one before us. That the scope of such review is *narrowly circumscribed* is beside the point. For the courts cannot exercise their *duty of review unless they are advised* of the considerations underlying the action under review. If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law. In either event the orderly functioning of the process of review requires that the grounds *upon which the administrative agency acted be clearly disclosed and adequately* sustained. 'The administrative process will best be vindicated by clarity in its exercise.' Phelps Dodge Corp. v. National Labor Relations Board, 313 U. S. 177, 197, 61 S. Ct. 845, 853, 85 L. Ed. 1271, 133 A.L.R. 1217. What was said in that case is equally applicable here: 'We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board.' Ibid. Compare United States v. Carolina Carriers Corp., 315 U. S. 475, 488, 490, 62 S. Ct. 722, 729, 730, 86 L. Ed. 971. In finding that the Commission's order cannot be sustained, we are not imposing any trammels on its powers. We are not enforcing formal requirements. We are not suggesting that the Commission must justify its exercise of administrative discretion in any particular manner or with artistic refinement. We are not sticking in the bark of words. *We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in*

exercising its powers were those upon which its action can be sustained." (Emphasis added.)

This language is molded by the principle of the supremacy of the enacted law of the land and its application to both Commission and Court. It is not conceivable that the Congress intended these two *identical* review sections to have different meanings and variant effects. This is buttressed by the additional fact that the "Federal Power Act" (1935) was enacted at the same time as and in conjunction with the "Public Utility Holding Company Act of 1935," under the common title of "Public Utility Act of 1935." *Section 313(a)*, entitled "Court Review of Orders" in the Federal Power Act (U. S. C. A., Title 16, Sec. 825-1, C. 687, Title II, Sec. 213, 49 Stat. 860), also is *identical*, word for word, with the two review sections under consideration.

Furthermore, if that Court is not concerned legally with particular and material issues of fact, there is no occasion at all for bringing the record of evidence to that Court or for the statutory review itself, for relief from "confiscation" is still available through courts of equity. The salutary principle, that it is an error of law to render a decision predicated upon findings not supported by "substantial evidence" is the law declared in the Natural Gas Act, in conformity with the established and theretofore settled law of the land.

The principle is settled that the courts have no function to supervise the wisdom or policy of legislation, and that whether the errors thought to have been committed by Congress were those of commission or omission, yet the courts cannot refuse to respect the action of the legislative branch if within the constitutional power of that body. To neither the administrator nor the judge is delegated legislative choice.

> *Milk Wagon Drivers' Union v. Lake Valley F. Products*, 311 U. S. 91, 103, 61 Sup. Ct. 122, 128;
>
> *United States v. South Eastern Underwriters Ass'n.*, (July 1944), —— U. S. ——, 64 Sup. Ct. 1162, 1175-1176, 1178.

The legislature is presumed to have known the occasion

for legislation and to have known also its own legislative intentions. It also is to be assumed that that body embodied those intentions in the enacted law.

> "Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function."
>
> *Carmichael v. Southern Coal & Coke Co.*, 301 U. S. 495, 510, 57 Sup. Ct. 868, 872-873.

These principles are applicable to the consideration and application of the review provisions of *Section 19(b)* of the Act. By that section also, we are told, Congress was not changing the *then* law of the land respecting the judicial review of action by administrative agencies of the federal government. At the time of passage of both the Federal Power Act and the Natural Gas Act, the *law* as repeatedly and consistently declared by this Court was settled and clear as to the scope of such review. *Section 19(b)* is equally clear: "The finding of the Commission, *as to the facts*, if supported by substantial evidence, shall be conclusive." There is absolutely nothing therein about over-all "end result," "total effect," "entirety" or "consequences." That doctrine, we are now told, was announced in the *Natural Gas Pipeline Company* case 1942, *supra*, and thereafter applied in the *Hope Natural Gas Company* case (1944), *supra*.

In the latter case, this Court declares: "And when the Commission's order is challenged in the courts, the question is whether that order 'viewed in its entirety' meets the requirements of the Act;" citing the *Natural Gas Pipeline Company* opinion at *page 586 of 315 U. S.* The language in that decision obviously referred to is "If the Commission's order, *as applied to the facts before it* and viewed in its entirety, produces no arbitrary result, our inquiry is at an end." Neither is a formula, but both are variant statements of a controlling legal principle.

The foregoing quoted sentence from the *Natural Gas Pipeline Company* opinion is a part *only* of a single complete statement and idea stated in the paragraph of which the quoted sentence is the conclusion, both in form and substance.

The preceding language of the paragraph must be assumed to be something other than surplusage. If so, the entire paragraph, not the quoted sentence merely, tells us what this Court in 1942 stated the law to be. That language we quote:

"The Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as *applied to the facts before it and viewed in its entirety*, produces no arbitrary result, *our* inquiry is at an end." (Emphasis added.)

Federal Power Commission v. Natural Gas Pipeline Co., 315 U. S. 575, 586, 62 Sup. Ct. 736, 743.

Before the "end result" doctrine can come into play then, four prerequisites must be met according to this 1942 declaration of this Court in the *Natural Gas Pipeline Company* opinion, *supra*, to-wit: (1) "a fair hearing," and all that is involved therein under law, (2) "proper findings made," (3) "statutory requirements satisfied," both by Commission and Court, and (4) "limits of due process" must not be "overstepped." These four prerequisites are not mere words; they relate to the substance of rights and *duties* under our constitutional system. And these fundamental rights and duties obviously were not discarded or repudiated by the last sentence of the paragraph. Any such view casts doubt upon the good faith of this Court in 1942.

It is to be recognized that the order "*in its entirety*" in this case comprehends some 13 enumerated findings and conclusions, as well as the entire opinion incorporated therein by express reference *(R. V. 1, pp. 94-97)*. Moreover, "the facts before it" (the Commission) are *all* the evidentiary matters in the record. These then are the measures and

guides which this Court, in conformity with constitutional requirements and the uniform decisions of this Court, declares must be "viewed" on review. The reviewing function of that Court is judicial and "does not trench upon, or involve the exercise of, administrative authority" nor can it "be regarded as an attempt to vest in the court an authority to revise the action of the Commission."

"In considering the effect of the Commission's determination, the fundamental question is the intent of Congress. The language of the provision points to definitive action. The Commission is to '*determine.*' The Commission must determine '*after hearing.*' The requirement of a 'hearing' has obvious reference 'to the tradition of judicial proceedings in which evidence is received and weighted by the trier of the facts.' The 'hearing' is 'the hearing of evidence and argument.' Morgan v. United States, 298 U. S. 468, 480, 56 S. Ct. 906, 911, 80 L. Ed. 1288. And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist. Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U. S. 88, 91, 33 S. Ct. 185, 186, 57 L. Ed. 431. The Commission is not only authorized but 'directed' to give the hearing and make the determination when requested. We cannot think that a determination so prescribed and safeguarded was intended to have no legal effect. . . .

. . . . . .

"What is the scope of the judicial review to which respondent is entitled?

. . . . . .

"The condition which Congress imposed was that the Commission should make its determination after hearing. There is no question that the Commission did give a hearing. Respondent appeared and the evidence which it offered was received and considered. The sole remaining question would be whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious. Id. *That ques-*

tion must be determined upon the evidence produced before the Commission." (Emphasis added.)

Shields v. Utah Idaho Cent. R. Co., 305 U. S. 177, 182, 184, 185, 59 Sup. Ct. 160, 163, 164, 165.

In considering the character of the reviewing authority of the Circuit Court of Appeals under the provisions of the "Radio Act of 1927," as amended July 1, 1930, this Court declared:

"The powers of the Commission were defined, and definition is limitation. Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision. These are questions of law upon which the court is to pass. * * * *A finding without substantial evidence to support it—an arbitrary or capricious finding—does violence to the law.* It is without the sanction of the authority conferred. And an inquiry *into the facts* before the Commission, in order to ascertain whether *its findings* are thus vitiated, belongs to the judicial province * * *." (Emphasis added.)

Federal Radio Comm. v. Nelson Bros. Co., 289 U. S. 266, 274-279, 53 Sup. Ct. 627, 632-633.

It is significant that the opinion in the case last above referred to was pronounced by this Court *on the same day* and by the same justices as the opinion in *Los Angeles Gas & Elec. Corp. v. Railroad Comm.*, 289 U. S. 287, 53 Sup. Ct. 637, relied upon by this Court in both the *Natural Gas Pipeline Company* and *Hope Natural Gas Company* cases, *supra*.

The doctrine of *unmeasured* "end result" thus does not find any support whatever in the Natural Gas Act or in other similar or identical statutes under consideration, or in *St. Joseph Stock Yards Co. v. United States* (1936), 298 U. S. 38, 56 Sup. Ct. 720, or in any other decisions of this Court. It has been variously declared by this Court that, "unless there has been *error in the result* as well as error

in the reasoning," the administrative order must stand *(Dayton Power & Light Co. v. Pub. Utilities Comm.*, 292 U. S. 290, 298, 54 Sup. Ct. 647, 652); "When the legislative method is disclosed, it may have a definite bearing upon the validity of the result reached" *(Chief Justice Stone* dissenting in *West v. Chesapeake & Pot. Tel. Co.*, 295 U. S. 662, 693, 55 Sup. Ct. 894, 907); and again in the same case "Mere error in reasoning upon evidence introduced does not invalidate an order." "Where the decision below is correct, it must be affirmed by the appellate court though the lower tribunal gave a wrong reason for its action" *(J. E. Riley Inv. Co. v. Comm'r Int. Rev.*, 111 U. S. 55, 59, 61 Sup. Ct. 95, 97). These and similar statements reflect the unquestioned law that, if the "end result" *measured* by the issues of material fact in the record, and the law controlling the determination of such issues *is correct*, the court of review properly may not interfere with such regulatory result. With this principle of law we have no controversy.

In *Los Angeles Gas & Electric Corp. v. Railroad Commission*, 289 U. S. 287, 314, 53 Sup. Ct. 637, 647, this Court examined with particularity and in detail the "*result*," *based upon the specific evidence in the record and the controlling law*. In that case errors, assumed to have been made with respect to certain issues of fact, were considered and found to be neutralized by favorable allowances with respect to other elements of the rate base, *measured in the common denominator of dollars, that is, value.* This Court therein declared "* * * it is the function of the Court * * * to examine the result of the legislative action in order to determine whether its total effect *is to deny to the owner of the property a fair return for its use.*"

Similarly, in *Dayton Power and Light Co. v. Public Utilities Comm.*, 292 U. S. 290, 296, 54 Sup. Ct. 647, 651, this Court specifically appraised the end "result," *on the record and the issues of fact therein, as presented by the evidence.* "In determining the base on which a fair price is to be reckoned" as to "the value of the gas fields" of the Company in that case, this Court examined *in detail* the evidence upon and the determination by the Commission of that issue and the disposition made of it by the Supreme Court

of Ohio. This Court then concluded *on the record evidence relating to that specific question* that "the property interests of the appellant" had not been confiscated. The fact, that "what was said and what was done" by the Commission were different, was immaterial, because "what was done," *based on the record*, did not result in confiscation of the gas fields of the utility there involved.

Under the law, "result," that is, "the Commission's order, *as applied to the facts* before it, and viewed in its entirety," is measured and circumscribed by the requirements that there be "substantial evidence" upon the specific issues involved, and that controlling law applicable to the particular case, both sustain and justify "the conclusions reached."

Thus, none of the decisions of this Court when carefully considered, directly or by implication, is authority for the proposition: that a result *contrary* to correct reasoning can stand; or that a result predicated upon grounds upon which the Commission action cannot be sustained, can stand; or that a result, unsupported by substantial evidence as to issues of material fact, can stand; or that a result in disregard of or contrary to the terms of the statutory charter of regulatory authority, can stand; or that a result however wrong, under which the utility can manage to survive and continue to render service, can stand.

Neither language nor formula can create essential facts or satisfy basic requirements. So this Court, referring to the order under review, clearly did use the phrases, "as applied to the facts," and "viewed in its entirety" advisedly. With the facts then, must be laid that foundation, absolutely essential to support the Commission action in this case.

True, "the Commission's order does not become suspect" *merely* "by reason of the fact that it is challenged." But, it cannot be purified or rendered valid "in its entirety" or at all by a process of sanctification. It is not sacrosanct. Congress has otherwise ordered and in so doing "has not used meaningless words." The term "arbitrary" is under established law a general expression or conclusion indicating that with respect to one or more specific and material is-

sues the administrative order, measured by the record and controlling law, is not supported by substantial evidence or is contrary to law. Such is the unmistakable measure of review declared in the Natural Gas Act. If this Court of Appeals be not concerned with particular issues as such, why is the statutory review provided at all, for relief from "confiscation" is still available through courts of equity. Why does the reviewing ambit of that Court include the broad power of "affirming, modifying or setting aside, in whole or in part" the Commission order! Why the repeated reference to "substantial evidence" and to the "findings as to the facts" found in *Section 19(b)!* Why is the complete record including all the evidence required for that review! Why is the burden of proof imposed on the Commission if that burden is to be dispensed with directly or indirectly! Why is the review restricted to the specific points presented to the Commission on petition for rehearing before it! Why is the review commandingly directed to "the finding of the Commission *as to the facts*"!

We have no controversy with the position of that Court that upon review the order of the Commission "carries with it a presumption of correctness and the burden rests upon him who attacks it on review for want of substantial evidence to *show the absence of such evidence.*" *(Colorado Interstate Gas Co. v. Fed. Power Comm.*, 142 Fed. (2d) 943, 952). But the "presumption of correctness" is and remains a presumption, and it cannot supplant or excuse nonperformance of any clear judicial duty.

> "That the concurrent findings of two lower courts are persuasive proof in support of their judgments is a rule of wisdom in judicial administration. In reaffirming its importance we mean to pay more than lip service. *But the rule does not relieve us of the task of examining the foundation for findings in a particular case.*"
>
> *Baumgartner v. United States* (June 12, 1944), —— U. S. ——, 64 Sup. Ct. 1240.

That Court also recognized that "in the absence of substantial evidence" the action of the Commission is "the arbitrary exercise of power by administrative fiat and cannot stand." *(Colorado Interstate Gas Co. v. Fed. Power*

Comm., supra, p. 954.) The burden resting on the petitioner on review "to show the absence of such evidence," in the particular record before the Court, this petitioner meets.

What "evidence" then is it that the petitioner must "show the absence of"? Admittedly the evidence in this record is voluminous. Moreover, all the evidence in this record relates only to specific fact determinations, none to the conclusion of unreasonableness as such. A finding of unreasonableness, when justified, is merely the conclusion drawn from *all* determinations of material fact under the applicable rules of law.

This Court, speaking through *Mr. Justice Frankfurter,* declared, in the case above referred to:

> "The phrase 'finding of fact' may be a summary characterization of complicated factors of varying significance for judgment. Such a 'finding of fact' may be the ultimate judgment on a mass of details involving not merely an assessment of the trustworthiness of witnesses but other appropriate inferences that may be drawn from the living testimony which elude print. The conclusiveness of a 'finding of fact' depends on the nature of the materials on which the finding is based. The finding even of a so-called 'subsidiary fact' may be a more or less difficult process varying according to the simplicity or subtlety of the type of 'fact' in controversy. *Finding so-called ultimate 'facts' more clearly implies the application of standards of law. And so the 'finding of fact' even if made by two courts may go beyond the determination that should not be set aside here. Though labeled 'finding of fact' it may involve the very basis on which judgment of fallible evidence is to be made.*" (Emphasis added.)
>
> *Baumgartner v. United States, supra.*
>
> See: *Security Flour Mills Co. v. Comm. Int. Rev.,* —— U. S. ——, 64 Sup. Ct. 596, 598.

It is not the law that a rate making authority may, by making a finding that certain rates are unreasonable, preclude judicial review of the evidentiary and legal foundations of such finding. If, as we believe, the record abund-

antly discloses, the Commission proceeded without supporting evidence, and without warrant of law, no conclusion which the Commission reached upon such improper basis can convert that wrong into right. The review, therefore, as stated by this Court, must be "applied to the facts" and to the legal controls, not to the ultimate conclusion. This then is the "evidence" that the petitioner must "show the absence of."

It is only after the several specific determinations of material issues of fact have been found to be supported by "substantial evidence" and in conformity with controlling law that the court reaches the realm of "total effect" and can view the order "in its entirety."

While, of course, an administrative order will not be set aside for *mere* error in method of reasoning, yet if the proceeding is permeated with and pervaded by insufficiency of evidence or mistakes of law so that "the end result," so-called, is controlled or affected thereby, the order cannot stand. This is the substance of the fully and long established process of judicial review recognized in and provided by the Natural Gas Act, which contains "nothing novel in its provisions." Failure or refusal of the proper reviewing court to conform to this principle of American jurisprudence amounts to nothing less than the abdication of the mandatory judicial function imposed upon it, by law. The Court of Appeals is not free to cast aside that duty at will.

See: *Addison v. Holly Hill Fruit Products, Inc.*, —— U. S. ——, 64 Sup. Ct. 1215, 1223.

Whatever the limited duty of review incumbent upon this Court under writ of certiorari may be, the duty of that Court is neither a matter of discretion nor so limited. The reasons which impelled Congress to grant two different measures of review under the Natural Gas Act as well as other similar acts, are obvious. However the discretion and limitations inherent in one review cannot be read into and adopted as the measure of the other review.

APPENDIX D.

Colorado-Wyoming Gas Company
Peak-Day Purchases and Deliveries of Natural Gas—1938, 1939, 1940.

The peak-day purchases and deliveries in M.c.f., of natural gas made by Colorado-Wyoming Gas Company in the years 1938, 1939 and 1940 at 12.9 lbs. and 14.65 lbs. per square inch absolute, respectively, were:

	Gas Purchased	At 12.9 lbs. Pressure	At 14.65 lbs. Pressure
12/26/38	Colorado Interstate Gas Co.	15,315	13,486
	Berthoud Field	170	150
		15,485	13,636
	Gas Delivered	15,485	13,637
	Gas Purchased		
2/ 9/39	Colorado Interstate Gas Co.	12,871	11,334
	Berthoud Field	196	173
		13,067	11,507
	Gas Delivered	13,122	11,556
	Note: Total Industrial	593	522
	Sales for Resale Customers	12,529	11,034
1/18/40	Gas Purchased		
	Colorado Interstate Gas Co.	11,646	10,255
	Berthoud	228	201
		11,874	10,456
	Gas Delivered	12,803	11,274
	Note: Sales for Resale Customers		10,191

	Gas Purchased		
12/13/40	Colorado Interstate Gas Co.....	16,053	14,135
	Berthoud Field.....	151	133
		16,204	14,268
	Gas. Delivered.....	15,929	14,026
	Note: Sales for Resale Customers	11,468	10,098

(R. V. 1, pp. 186-187, 142.)

Commission witness *Lyon* testified with respect to system peak-day deliveries of Colorado-Wyoming Gas Company, as follows:

	At 12.9 lbs. pressure	At 14.65 lbs. pressure
12/26/38	15,244 mcf.	13,075 mcf.
1/16/39	13,707 mcf.	12,070 mcf.
2/ 9/39	12,672 mcf.	10,786 mcf.
5/17/39	14,209 mcf.	12,512 mcf.

(R. Vol. 1, pp. 186-187.)
(Comm. Ex. 227, Table 2, Line 40, Cols. 7-8-9.)

2/ 9/39	12,871 mcf.	11,334 mcf.

(Comm. Ex. 226, Table 2, Line 28, Cols. 7-8-9.)

Further testimony was given by Company witness *Hancock* as to "peak-day deliveries" in 1940 as follows:

"*The Trial Examiner:* Mr. Hancock, does the record reflect the peak day capacity of this line in 1940 and the peak day demand of the resale customers?

"*The Witness:* The peak day demand on January 18, 1940, was 11,646,000 cubic feet. On that day the peak day delivery to "sale for resale" customers is 10,191,000 cubic feet. During that day for just portions of the day there were small deliveries to certain of the industrials, but not for the entire day, which accounts for a small delivery to the industrials on that day.

"On November 12th 1940 the peak day demand was 15,817,000 cubic feet, which so far as I know is the highest peak ever experienced and it is my information that on that day the industrials were all off for a substantial

part of the day, as stated in regard to the Cement plant, some seven to nine hours, but that being such a recent peak the data pertaining to it has not been available in all respects.

"*The Trial Examiner:* Now, what was your peak day capacity for the year 1940, Mr. Hancock?

"*The Witness:* Both at the time of the January 18, 1940 peak and the November 12, 1940 peak. I would regard the system as fully loaded at both of those times."
(R. V. 1, p. 142.)